Supreme Court, U.S.
FILED
NO. 95-709 NOV 2 - 1995
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Petitioners,

v.

JO-ANN TEBBETTS, Administratrix of the Estate of
Rebecca Anne Tebbetts,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of New Hampshire correctly held, in direct conflict with decisions of four United States Courts of Appeals, that the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208 do not preempt state tort law claims alleging that an automobile was defectively designed because it was not equipped with airbags.

RULE 29.1 LISTING

Petitioner Ford Motor Company has no parent company. The entities listed below are those in which Ford Motor Company owns an equity interest of at least ten per cent, but that are not wholly owned by Ford Motor Company:

Autolatina America, Inc.
Ford Holdings
Great Mall of the Bay Area Management Company

Argentina
- Autolatina Argentina S.A.
- Invercred Compania Financiera S.A.

Australia
- Ford Motor Company of Australia Limited

Belgium
- Ford Credit N.V.
- Ford Motor Company (Belgium) N.V.

Brazil
- Apolo—Administradora de Bens S/C Ltda.
- Autolatina S.A.

Canada
- TCG, International

Denmark
- Ford Motor Company A/S

Finland
- Oy Ford Ab

Germany
- Ford Werke-Aktiengesellschaft & Co. Leasing KG

Holland
- Ford Nederland B.V.

Netherlands
- Ford Credit B.V.

Norway
Ford Motor Norge A.S.

New Zealand
Ford Motor Company of New Zealand Limited

Singapore
Ford Motor Company Private Limited

South Africa
South African Motor Corporation, Ltd. (SAMCOR)

Sweden
Ford Motor Company Aktiebolag

Switzerland
Ford Motor Company (Switzerland) S.A.

Petitioner Robert H. Irwin Motors, Inc. has no parent or subsidiary company.

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PETITION FOR WRIT OF CERTIORARI

Ford Motor Company and Robert H. Irwin Motors, Inc. (collectively, "Ford"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire is not yet reported and is included in the Appendix at pp. 1a-7a. The order of the superior court granting Ford's motion for summary judgment is not reported and is included in the Appendix at pp. 8a-12a.

JURISDICTION

The final judgment of the Supreme Court of New Hampshire on the federal constitutional question presented by this petition was entered on September 19, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-86 (1975).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.

15 U.S.C. § 1392(d)[1] provides:

> (d) Supremacy of federal standards; allowable higher standards for vehicles used by Federal or state governments
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in

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[1] The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, along with other statutes governing transportation, recently was recodified "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). As a result, what was 15 U.S.C. § 1392(d) is now 49 U.S.C. § 30103(b). All of the applicable preemption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. For convenience, this petition uses the citations employed in those decisions. The recodified cited provisions are set forth in the Appendix at pp. 13a-14a.

> effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397(k)[2] provides:

> (k) Continuation of common law liability
>
> Compliance with any Federal motor safety standard issued under this subchapter does not exempt any person from any liability under common law.

49 C.F.R. § 571.208 is a lengthy regulation, the pertinent text of which is set forth in the Appendix at pp. 15a-36a.[3]

STATEMENT OF THE CASE

1. On May 15, 1991, at approximately 2:15 a.m., Rebecca Anne Tebbetts was killed when the 1988 Ford Escort she was driving hit a rock on the shoulder of the road, richocheted across two lanes of traffic, slid down an embankment, smashed into a tree, and rolled over. On January 29, 1993, Respondent, the administratrix of the decedent's estate, filed this lawsuit, alleging that the 1988 Escort was defectively designed because it provided pro-

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[2] Now 49 U.S.C. § 30103(e).

[3] The pertinent regulatory text as it existed in 1988 is set forth at pp. 27a-36a. The pertinent regulatory text as it exists today is set forth at pp. 15a-26a. The differences are not material to the question presented here.

tection to its driver with a safety-belt system consisting of a motorized, automatic shoulder belt and a manual lap belt, rather than with an airbag.

2. When Ford designed and manufactured the 1988 Escort, there was in effect, and there still is in effect, a Federal Motor Vehicle Safety Standard, No. 208, that required manufacturers to phase in passive restraints—that is, restraint systems, such as automatic safety belts or airbags, requiring no action by the occupant to make the system operational after the ignition has been turned on—by installing some form of passive restraints into the front outboard seating positions of 10 percent of 1987 model-year cars, 25 percent of 1988 model-year cars, 40 percent of 1989 model-year cars, and all 1990 model-year cars. 49 C.F.R. § 571.208. The Safety Standard explicitly authorized and encouraged manufacturers to provide a variety of passive restraints, including automatic safety belts. *Id. See* 49 Fed. Reg. 28962 *et seq.* (July 17, 1984).

In explaining why federal safety policies required a Safety Standard that would encourage automobile manufacturers to provide the public with a variety of passive restraint systems, the Secretary of Transportation emphasized why one specific such restraint, the airbag, should not be required instead of, or in addition to, automatic safety belts. First, the real-world data with respect to the effectiveness of airbags relative to the effectiveness of safety belts were still too sparse to be statistically reliable; and what data there were showed that airbags previously available had provided *no* increased safety over safety belts *as used,* even though the usage rate for manual belt systems was less than 20 percent:

> Based on field experience through December 31, 1983, . . . the computed airbag and manual belt effectiveness (as used in the equivalent cars) for fatalities is now the same. This means that airbags would not save any more lives than the belt systems as used in those cars.

49 Fed. Reg. 28962, 28985 (July 17, 1984). The phase-in schedule selected by the Secretary was necessary to achieve federal safety goals because "[w]idespread use of both [airbag systems and safety belt] systems is the only way to develop definitive data" as to their relative effectiveness. *Id.* at 29000, 29001.

Second, airbags continued to present unique safety dangers, including the danger from propellants used to inflate airbags and the danger of disposal of cars with "live" airbag propellants still in them. The Secretary cautioned, for example, that "the Department can not state for certain that airbags will never cause injury or death to a child." *Id.* at 28992.

Third, the Secretary was concerned that an airbag requirement might indirectly cause even more injuries and deaths because

> the high cost of replacing an airbag may lead to its not being replaced after deployment. The result would be no protection for the front seat occupants of such an automobile.

Id. at 29001.

Fourth, after observing that public acceptance of safety devices likely to be installed in compliance with Federal Motor Vehicle Safety Standards was one of the factors the Department of Transportation was required by law to consider, *id.* at 28987, the Secretary expressed a concern that requiring airbags in all cars would provoke a consumer "backlash" that would defeat the Department's safety goals. *Id.* at 29001.

Fifth, the Secretary concluded that requiring the installation of airbags in all cars would "stifle innovation in occupant-protection systems" and thereby create "the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." *Id.*

Thus, the choice of restraint-system options provided in Safety Standard 208 was promulgated because the Federal Government had determined that federal safety policies would be severely impaired if the manufacturers did not provide a variety of restraint systems, specifically including automatic safety belts. As the Third Circuit later found, "That such flexibility and choice is an essential element of the regulatory framework established in Standard 208 has repeatedly been made clear in the regulatory history of this particular safety standard." *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1124 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990).

3. In the several years following the promulgation of the 1984 amendments to Safety Standard 208, the National Highway Traffic Safety Administration and the Department of Transportation three times explicitly stated that the Safety Standard was intended to achieve implied preemption of state common law claims alleging that cars without airbags are for that reason defective. Brief of the United States as *Amicus Curiae*, filed in *Wood v. General Motors Corp.*, 494 U.S. 1065 (1990) (No. 89-46) (hereinafter "United States Amicus Brief in *Wood*"); Brief of the United States as *Amicus Curiae*, filed in *Freightliner Corp. v. Myrick*, —— U.S. ——, 115 S. Ct. 1483 (1995) (No. 94-286) (hereinafter "United States Amicus Brief in *Myrick*"); Brief of the United States as *Amicus Curiae* filed in *Ritt v. General Motors Corp.*, No. 88-1822 (7th Cir. 1989) (hereinafter "United States Amicus Brief in *Ritt*").

4. Against that background, on August 11, 1993, Ford moved for summary judgment in this action on the ground that, under the Supremacy Clause of the United States Constitution, the "no-airbag" claim asserted by Respondent under New Hampshire state law was preempted by the National Traffic and Motor Vehicle Safety

Act of 1966, 15 U.S.C. §§ 1381 *et seq.* ("the Safety Act"), and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208. On October 14, 1993, the superior court granted Ford's motion.

Respondent appealed to the Supreme Court of New Hampshire. On September 19, 1995, that court announced its decision holding that "no-airbag" claims are not preempted by federal law and reversing the judgment of the superior court.

Although recognizing that the Safety Act contained an express preemption provision, 15 U.S.C. § 1392(d), that "alone might suggest that common law actions are preempted," App. at 4a, the Supreme Court of New Hampshire held that the existence of another provision later in the Act, 15 U.S.C. § 1397(k), precluded any express preemption. Without parsing the language of section 1397(k), comparing it to the two explicit saving clauses in the preemption provision itself, or discussing any of this Court's many decisions establishing the meaning and effect of saving clauses, the court characterized that section as a saving clause and concluded without more: " 'It is difficult to imagine broader language.' We therefore conclude that state common law is not explicitly preempted." App. at 5a (citation omitted).

Turning next to implied preemption, the New Hampshire court held that the presumption against express preemption of state police-power regulations applies to all forms of implied preemption as well, App. at 5a, and that section 1397(k) and its legislative history provided "a reliable indicium of congressional intent" to disallow all forms of implied preemption. App. at 6a. The court did not inquire at all as to whether the plaintiff's "no-airbag" claim under state common law standards would conflict with the federal purposes and policies underlying Safety Standard 208. In fact, the court did not even acknowledge that the Federal Government had

three times explicitly declared that "no airbag" claims would create such a conflict and should be preempted.

The New Hampshire court recognized that "the majority of courts faced with a similar preemption inquiry have held common law actions preempted," App. at 6a, and the court specifically cited the First Circuit's decision so holding in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). The only explanation offered by the court for placing itself into direct conflict with the First Circuit was this: "Had the United States Supreme Court not clarified preemption analysis in *Cipollone* [*v. Liggett Group, Inc.*, —— U.S. ——, 112 S. Ct. 2608 (1992)] subsequent to *Wood*, Ford's argument would be more persuasive." App. at 6a. The court did not explain how it thought *Cipollone* had undermined *Wood*, other than to cite a law review article in which the author argued that in *Cipollone*,

> [c]ontrary to any prior precedent, seven justices apparently ruled that all doctrines of implied preemption, both "conflict" and "occupation-of-the-field" varieties, are eliminated once Congress enacts a provision that, to some degree, expressly preempts state law.

Kurt B. Chadwell, *Automotive Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 142 (1994) (hereinafter "Chadwell") (cited in App. at 6a). The New Hampshire court did not acknowledge that the article had been written before this Court's recent decision rejecting that interpretation of *Cipollone* as "without merit." *Freightliner Corp. v. Myrick*, —— U.S. ——, ——, 115 S. Ct. 1483, 1487 (1995).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A DIRECT CONFLICT, ON IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW AND FEDERAL STATUTORY INTERPRETATION, BETWEEN A STATE COURT OF LAST RESORT AND FOUR FEDERAL COURTS OF APPEALS, INCLUDING THE COURT OF APPEALS FOR THE CIRCUIT IN WHICH THAT STATE IS LOCATED

A. The Decision Below Conflicts With Decisions of Four Federal Courts of Appeals and Many Other Courts

In this case the Supreme Court of New Hampshire ruled that "no-airbag" claims brought under a state's tort law are neither expressly nor impliedly preempted by federal law. In *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), however, the First Circuit had already held that "no-airbag" claims *are* impliedly preempted by the Safety Act and Safety Standard 208. Thus, the New Hampshire court created a direct conflict between itself and the United States Court of Appeals for the circuit in which New Hampshire is located.

The decision below also directly conflicts with decisions by all of the other three United States Courts of Appeals that have addressed this issue. Those three courts, like the First Circuit Court of Appeals, have held "no-airbag" claims preempted by the Safety Act and Safety Standard 208. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990);[4] *Kitts*

[4] In *Myrick v. Freuhauf Corp.*, 18 F.3d 1516 (11th Cir. 1994), in the context of determining whether common law tort claims were preempted by Safety Standard 121, governing air brakes in trucks, the Eleventh Circuit opined that this Court's decision in

v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

Still further, the New Hampshire court's decision directly conflicts with decisions by at least 83 other state appellate and trial courts and by at least 51 United States District Courts throughout the nation. *E.g.*, *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Nissan Motor Corp. v. Superior Court*, 261 Cal. Rptr. 80 (Ct. App. 1989), *cert. denied*, 494 U.S. 1066 (1990); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), *cert. denied*, 487 U.S. 1236 (1988); *Gardner v. Honda Motor Co.*, 536 N.Y.S.2d 303 (1988).[5] Indeed, although the New Hampshire court attempted to justify its disagreement with all of those courts by indicating that it might have reached a different result "[h]ad the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood*," App. at 6a, the court simply ignored the fact that, *after Cipollone*, at least eleven United States District Courts and six states' appellate courts had given preemptive effect to the Safety Act and Safety Standard 208, thus disagreeing with the New Hampshire court's suggestion that in *Cipollone* this Court had significantly restricted the scope of the Supremacy Clause. *E.g.*, *Johnson v. General Motors Corp.*, 889 F. Supp. 451 (W.D. Okla. 1995); *Tammen v. General*

Cipollone v. Liggett Group, Inc., —— U.S. ——, 112 S. Ct. 2608 (1992), had overruled the reasoning that the Eleventh Circuit had relied on in holding "no-airbag" claims preempted in *Taylor*. On review, however, this Court flatly rejected as "without merit" the Eleventh Circuit's reading of *Cippollone*. *Freightliner Corp. v. Myrick*, —— U.S. ——, ——, 115 S. Ct. 1483, 1487 (1995). Accordingly, *Taylor's* holding that "no-airbag" claims are impliedly preempted is still the law of the Eleventh Circuit.

[5] The 134 decisions finding preemption are listed in the Appendix at pp. 37a-46a.

Motors Corp., 857 F. Supp. 788 (D. Kan. 1994); *Montag v. Honda Motor Co.*, 856 F. Supp. 574 (D. Colo. 1994), *appeal filed; Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *O'Bryan v. Volkswagen of Am., Inc.*, 838 F. Supp. 319 (W.D. Ky. 1992); *Panarites v. Williams*, 629 N.Y.S.2d 359 (App. Div. 1995); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. Ct. App. 1994), *cert. denied*, No. 94-1910, 1995 WL 334794 (Oct. 2, 1995); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div.), *cert. denied*, 649 A.2d 1291 (N.J. 1994); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App.—Dallas 1993, no writ); *Wilson v. Pleasant*, 645 N.E.2d 638 (Ind. Ct. App. 1994), *cert. granted and decision vacated while case is pending before Ind. Supreme Ct.*

B. The Same Conflict Is Developing Among Other Lower Courts

Although the Supreme Court of New Hampshire is the first state court of last resort to have put itself into direct conflict with the federal courts of appeals by holding "no-airbag" claims not preempted, judicial conflicts on this important question of preemption law are developing especially between state courts and federal courts. Thus, for example, a direct conflict exists in Pennsylvania, where the Third Circuit has held "no-airbag" claims preempted and the Pennsylvania Superior Court, Appellate Division, has held such claims not preempted. *Compare Pokorny*, 902 F.2d 1116, *with Heiple v. General Motors Corp.*, No. 808, 1995 WL 602836, —— A.2d —— (Pa. Super. Ct. Oct. 13, 1995), *and Gingold v. Audi-NSU-Auto Union A.G.*, 567 A.2d 312 (Pa. Super. Ct. 1989). The 42 court decisions finding no preemption under Safety Standard 208 are listed in the Appendix at pp. 47a-49a.

The adverse consequences of this developing nationwide judicial disarray are considerable, for the public, the

courts, and the automobile industry. The Supremacy Clause, the federal Safety Act, and federal Safety Standard 208, rather than being applied to like claims in a like manner, are being applied in patchwork fashion. Whether manufacturers must bear the burden of defending "no-airbag" claims depends on the state in which the claim is brought and, as to some states, whether the claim is brought in a state court or in a federal court in the same locale.

The conflict not only spawns inconsistent application of the Supremacy Clause, but erodes the very core of federal safety policies underlying Safety Standard 208. As the National Highway Traffic Safety Administration and the Department of Transportation have explained, "[Safety Standard] 208 establishes . . . an express federal safety policy of encouraging diversity in passive protection systems. Holding a motor vehicle manufacturer liable for failing to install one specific system—an airbag protection system—would conflict with that fundamental objective . . . ." United States Amicus Brief in *Wood*, at 8.

Also, the volume of cases in which the conflict is likely to continue to manifest itself, if left unresolved by this Court, is now sure to increase. Since July 1984, when the Safety Administration promulgated the version of Safety Standard 208 here in issue, more than 100 million automobiles have been manufactured and sold with the wide variety of passive restraints—the motorized shoulder belt involved in this case, the two-point belt system first developed by Volkswagen, the three-point, door-mounted belt system developed by General Motors, airbags, and others—that the Safety Administration sought to elicit by promulgating those amendments. Approximately 93 million of those automobiles were equipped with restraint systems other than airbags in one or more of the front outboard seating positions. *See generally* Automotive News Market Data Books (1985-1995). Moreover, although modern restraint systems and other factors have dramatically reduced the annual number and

frequency of reported injury-producing accidents since 1984, there still are approximately two million such accidents each year. *See* National Highway Traffic Safety Administration, Traffic Safety Facts 1993, at 14 (1994). In jurisdictions that hold "no-airbag" claims not preempted, almost any of those accidents can spawn a claim that an airbag would have prevented or reduced some injury. Unless this Court resolves the conflict and confirms that the federal courts of appeals are correct and the Supreme Court of New Hampshire incorrect, more and more plaintiffs are likely to bring "no-airbag" claims, trying to persuade still more courts to align themselves with the minority, errant no-preemption view.

C. The Judicial Conflict Arises Out of Two Important Questions of Federal Statutory Interpretation Explicitly Reserved by This Court Last Term

The conflict created by the decision below is further important because it directly implicates the two questions of federal statutory interpretation explicitly reserved by this Court last term in *Freightliner Corp. v. Myrick*, —— U.S. ——, ——, 115 S. Ct. 1483, 1487 n.3 (1995): (1) Whether the term "standard" in the Safety Act's express preemption provision, 15 U.S.C. § 1392(d), preempts only state statutes and regulations, and not common law; and (2) whether 15 U.S.C. § 1397(k) is a saving clause that precludes any preemption of common-law tort claims. Unless this Court addresses those issues now, the existing uncertainty is sure to spawn further judicial conflict. Accordingly, this case should be used to resolve the growing conflict and to restore uniform application of the Supremacy Clause, the Safety Act, and Safety Standard 208.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISIONS THAT ESTABLISH THE MANNER IN WHICH PREEMPTION ANALYSIS IS REQUIRED TO BE CONDUCTED

Because of its misunderstanding of basic preemption principles—especially the difference between the constitutional doctrine of preemption and the nonconstitutional affirmative defense of compliance with statutes or regulations—the Supreme Court of New Hampshire also misconstrued and misapplied this Court's decisions that establish the manner in which preemption analysis is required to be conducted. Other courts in the minority group that have held "no-airbag" claims not preempted have similarly misconstrued this Court's preemption decisions. Accordingly, review in this case is necessary to make even clearer the requirements that the Supremacy Clause imposes whenever preemption is asserted, whether with respect to the Safety Act and Safety Standard 208 or with respect to other federal statutes and regulations.

A. The Supreme Court of New Hampshire Misconstrued and Misapplied the Express Preemption Principles Established by This Court

The Supreme Court of New Hampshire correctly acknowledged that the Safety Act has a provision, 15 U.S.C. § 1392(d), that explicitly addresses the issue of preemption and that "alone might suggest that common law actions are preempted . . . ." App. at 4a. As codified until last year, and throughout the legislative proceedings that led to its enactment, the language of section 1392(d) appeared under one of two titles: "Supremacy of federal standards" or "Preemption." *See* 15 U.S.C. § 1392(d) (entitled "Supremacy of federal standards"); 112 Cong. Rec. 14,257 (1966) (entitled "Preemption" in bill reported from committee in Senate); H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731, 2732-2733 (entitled "Preemption"

in conference report); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966) (entitled "Preemption" in House report). Even as recodified last year, the provision is entitled "Preemption." 49 U.S.C. § 30103(b).

The preemption provision provides that, when a Federal Motor Vehicle Safety Standard is in effect, no state may establish or continue in effect "any safety standard" applicable to the same aspect of performance of motor vehicles or items of motor vehicle equipment unless the state standard is identical to the federal standard. This language encompasses state common law, to the same extent that it encompasses state statutory and regulatory law, because, as the New Hampshire court recognized, "[a] rule of the common law which permits the recovery of monetary damages for its breach self-evidently sets a standard and has been held to be a form of state regulation subject to the supremacy clause." App. at 4a (quoting *Cox v. Baltimore County*, 646 F. Supp. 761, 763 (D. Md. 1986). In fact, this Court has many times explicitly referred to common law rules as "state safety standards" or "state standards." *E.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to "state[] safety standards" set by California products liability common law); *International Paper Co. v. Ouellette*, 479 U.S. 481, 496 n.17 (1987) (noting the "possibility that [the defendant] will have to meet a number of different standards" if sued under different states' common law); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law). In addition, in *Cipollone* the Court reconfirmed that preemption provisions using such broad terms—in that case, "requirement or prohibition"—can preempt state common law as well as state statutory and regulatory law. *Cipollone*, —— U.S. at ——, 112 S. Ct. at 2611-12, 2617.

Nevertheless, the New Hampshire court proceeded to ignore the express preemption provision, focus solely on

section 1397(k) of the Safety Act, and, in construing section 1397(k), disregard the requirements of express preemption analysis long ago established, and recently reaffirmed, by this Court.

In *CSX Transportation, Inc. v. Easterwood,* —— U.S. ——, ——, 113 S. Ct. 1732, 1737 (1993), this Court reaffirmed the established principle that, in the interpretation of an express preemption provision, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue." *Accord Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). But in holding that section 1397(k) of the Safety Act precludes any preemption of common law claims, the New Hampshire court examined neither the text nor the structure of that section, either in isolation or in conjunction with the preemption provision, section 1932(d). Instead, the court merely quoted section 1397(k), denominated it a "saving clause," and stated, " 'It is difficult to imagine broader language.' We therefore conclude that state comomn law is not explicitly preempted." App. at 5a (citation omitted).

In fact, however, section 1397(k) is not a saving clause, as that term has long been used by this Court to describe preemption-limiting provisions in federal statutes, and it is not at all difficult to imagine preemption-limiting language broader than that used in section 1397(k). Section 1397(k) merely states, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

This narrow "compliance with" predicate differs dramatically from the much broader saving-clause language that Congress used in the second two sentences of section 1392(d) of the Safety Act itself. Each of those two saving clauses begins with the clear, unambiguous, and traditional anti-preemption saving language, "Nothing in this section shall be construed . . . ." The two saving clauses state:

> Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use, if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d).

As the First Circuit correctly recognized in *Wood*, 865 F.2d at 401 n.8, 417-18, the language of section 1397(k) definitively is *not* the language commonly employed by Congress in saving clauses intended to restrict the scope of preemption. The saving clauses in virtually every other case decided by this Court in this century have used broad language similar, and often identical, to that used in the saving clauses of section 1392(d), not the narrow "compliance with" language of section 1397(k).[6]

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[6] *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, —— U.S. ——, ——, 114 S. Ct. 517, 525 (1993) (interpreting saving clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance banking, or securities"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (interpreting saving clause of Federal Aviation Act of 1958, 49 U.S.C. § 1506, which states, "Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."); *Cipollone*, —— U.S. at ——, 112 S. Ct. at 2618 (referring to saving clause of Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406(c), which states, "Nothing in this Act shall relieve any person from liability, under common law or under State statutory law, to any other person."); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (interpreting saving clauses of 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-7 and 2000h-4; the first of these provides, "Noth-

The "compliance with" language addresses a different issue—namely, the extent to which compliance with gov-

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ing in this title shall be deemed to exempt or relieve any person from any liability . . . provided by any present or future law of any State . . . ."; the second states, "Nor shall any provision of this Act be construed as invalidating any provision of State law"); *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978) (interpreting saving clause of 1958 Disclosure Act, 29 U.S.C. § 301, which states, "The provisions of this Act . . . shall not be held to exempt or relieve any person from any liability . . . provided by any present or future law of . . . any State . . . ."); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210 (1986) (interpreting saving clause of Death on the High Seas Act, 46 U.S.C. § 767, which states, "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Chapter."). *See also Gade v. National Solid Wastes Management Ass'n*, —— U.S. ——, ——, 112 S. Ct. 2374, 2382, 2384 (1992) (29 U.S.C. §§ 653(b)(4) and 667(a), the saving clauses in Occupational Health and Safety Act); *California v. F.E.R.C.*, 495 U.S. 490, 497 (1990) (16 U.S.C. § 821, the saving clause in Conservation, Regulation of Power, and Water Rights Act); *Mansell v. Mansell*, 490 U.S. 581, 600 (1989) (10 U.S.C. § 1408(e)(6), the saving clause in Uniformed Services Former Spouses' Protection Act); *Ouellette*, 479 U.S. at 485, 493 (1987) (33 U.S.C. §§ 1365(a), 1370, the saving clauses in Navigation and Navigable Waters Act, Pollution Prevention Act); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 733 (1985) (29 U.S.C. § 514(a), the saving clause in National Labor Relations Act); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 7 n.11, 14-15, 29 (1981) (33 U.S.C. § 1415(g)(5), the saving clauses in Navigation and Navigable Waters Act, Ocean Dumping Act); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 443-44 (1963) (47 U.S.C. § 414, the saving clause in Wire or Radio Communication, Administration Provisions Act); *Northwest Airlines, Inc. v. County of Kent*, —— U.S. ——, 114 S. Ct. 855, 862 (1994) (49 U.S.C. § 1513(b), the saving clause in Federal Aviation Program Act); *Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962) (49 U.S.C. § 316, the saving clause in Motor Carriers, Rates, Fares and Charges Act, repealed Pub. L. 95-473, § 4(b), Oct. 17, 1978; Pub. L. 97-449, § 7(b), Jan. 12, 1983, 96 Stat. 2444); *Jones*, 430 U.S. at 534, 537 (15 U.S.C. § 1460, the saving clause in Fair Packing and Labeling Program Act); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981) (49 U.S.C. § 22, the saving clause in Interstate Commerce Act).

ernment statutes or regulations is a statutory or common law affirmative, complete defense. In *Honda Motor Co. v. Kimbrel*, 376 S.E.2d 379, 383 (Ga. Ct. App. 1988), for example, the court determined that compliance with Safety Standard 208 was a complete defense *under Georgia law* to a claim that a car was defective because it lacked an airbag. Section 1397(k) *permits* a state court to reach that conclusion, but it expresses Congress' intent not to *mandate* that result.

That the New Hampshire court completely misunderstood the fundamental difference between the Constitution-based doctrine of preemption and the statutory-based or common-law-based affirmative defense of compliance with statutes or regulations is made even clearer by the court's reliance on section 288C of the Restatement (Second) of Torts and page 233 of Dean Prosser's tort-law treaties. *See* App. at 7a. The former states, "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." The latter similarly provides, "While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* 233 (5th ed. 1984). Both authorities address the extent to which evidence of compliance with a statute or regulation supports an affirmative defense under common-law tort principles; neither addresses the issue of federal preemption; and both begin with the same "compliance with" language that appears in section 1397(k). Thus, contrary to the New Hampshire court's assumption, both authorities show that section 1397(k) merely makes clear that Congress did not intend for proof of a manufacturer's compliance with one or more Federal Motor Vehicle Safety Standards to be deemed an affirmative defense to common law tort claims as a matter of federal law.

The court failed to understand that preemption analysis generally does not even require a court to determine

whether a manufacturer complied with a federal standard, but instead merely requires the court to interpret the applicable federal statute and regulation, interpret the asserted state standard, and determine whether the latter conflicts with the former. In contrast, the issue of compliance does arise if a court concludes that preemption does not exist and the defendant then asserts that the factfinder should find the challenged conduct not tortious because of proof at trial that the conduct complied with applicable statutes or regulations. The text of section 1397(k) addresses this latter issue by expressing Congress' intent not to create such an affirmative defense as a matter of federal law.

B. The Supreme Court of New Hampshire Misconstrued and Misapplied the Implied Preemption Principles Established by This Court

The Supreme Court of New Hampshire also misconstrued and misapplied the implied preemption principles established by this Court. The court began by failing to recognize one of the basic categories of implied preemption that this Court has identified and applied in many cases—namely, implied conflict preemption. This is the very category of implied preemption that the United States repeatedly has stated was intended to apply to "no-airbag" claims.

1. *Failure to recognize the doctrine of implied conflict preemption*

The New Hampshire court asserted that state law is preempted by federal law in three circumstances, which it described by quoting from this Court's opinion in *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990), as follows:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law.
>
> . . .

> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation so pervasive as to make reasonable the inference that . . . Congress left no room for the States to supplement it."
>
> . . .
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements . . . .

App. at 4a (ellipses in original). The court's last ellipsis is crucial, because the language omitted at that point from this Court's opinion in *English* states that preemption also exists "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Because it failed even to recognize the existence of that form of implied conflict preemption, the New Hampshire court also failed to consider whether "no-airbag" claims create that type of conflict with federal law. And because it failed even to consider the possibility of that type of conflict preemption, the court failed to give any deference to, or even to mention, the United States' repeated explicit statement that Safety Standard 208 was intended to preempt "no-airbag" claims precisely because the federal policy "of affirmatively encouraging diversity . . . would be disrupted by tort liability . . . ." United States Amicus Brief in *Wood* at 15. *Accord* United States Amicus Brief in *Myrick* at 28 ("The Secretary explicitly determined that an all-airbag rule would have disserved the safety purposes of the Act. See 49 Fed. Reg. 29,001 (1984)."); United States Amicus Brief in *Ritt* at 32-34 ("This core regulatory objective of promoting diversity

in restraint technologies would be wholly undermined by state law rulings inducing manufacturers to switch to an all-airbag fleet.").

2. *Failure to recognize that in* Myrick *this Court rejected the notion that* Cipollone *had effectively prohibited implied preemption analysis whenever an express preemption provision exists*

The New Hampshire court misconstrued and misapplied this Court's decision in *Cipollone*. The court indicated that it might have followed the First Circuit's decision holding "no-airbag" claims impliedly preempted in *Wood*, "[h]ad the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood* . . . ." App. at 6a. The only indication the court gave of how it believed *Cipollone* had changed preemption law is that, immediately after that statement, it cited a law review article which argued that "[i]n *Cipollone*, the Court specifically rejected the implied preemption analysis upon which numerous lower courts have relied in holding that state law design-defect claims were preempted under the Safety Act." Chadwell at 142 (cited in App. at 6a).

The New Hampshire court failed to acknowledge, however, that only last term this Court in *Myrick* had explicitly and unequivocally rejected as "without merit" the exact argument made by the author of that article in support of his interpretation of *Cipollone*. That author argued as follows:

> *Cipollone* signaled a significant departure from the Supreme Court's previous preemption jurisprudence. . . . Contrary to any prior precedent, seven justices apparently ruled that all doctrines of implied preemption, both "conflict" and "occupation-of-the-field" varieties, are eliminated once Congress enacts a provision that, to some degree, expressly preempts state law.

Chadwell at 173. In *Myrick*, this Court responded to that argument as follows:

> As an initial matter, we must address the argument that we need not reach the conflict pre-emption issue at all. According to respondents and the Court of Appeals, *Cipollone* . . . held that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute. *This argument is without merit.* In *Cipollone* we did hold that the pre-emptive scope of the two statutes at issue was governed by the language in each act. That conclusion rested on a familiar canon of statutory construction and on the absence of any reason to infer any broader pre-emption.

115 S. Ct. at 1487-88 (emphasis added).

Thus, the New Hampshire court's explicit disregard of, and open conflict with, *Wood* and all of the other federal court of appeals' decisions holding "no-airbag" claims pre-empted sprang from a misinterpretation of *Cipollone* and a failure to acknowledge that this Court had flatly rejected that misinterpretation in *Myrick*. Most of the other state courts that have refused to follow *Wood* and the other decisions holding "no-airbag" claims preempted have likewise misinterpreted *Cipollone*, often relying on the Chadwell article. *See, e.g., Heiple*, 1995 WL 602836, at *15; *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149, 152 (Mo. Ct. App. 1994).

Even if the New Hampshire court did not intend to embrace that misinterpretation of *Cipollone*, the court's cramped view of implied preemption is inconsistent with, if not in direct conflict with, *Myrick* in another respect. The court concluded that, because it had "determined that the preemption clause when read in tandem with the saving clause [section 1397(k)] 'provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legisla-

tion.' " App. at 6a. Thus, the court's view was that the anti-preemption effect of section 1397(k) was so broad as to preclude courts from even considering whether any common law standard might conflict with federal law. Accordingly, the court did not inquire whether the common law standard in issue conflicted in any way with the purposes of Safety Standard 208 and the Safety Act.

Only last term, however, this Court in *Myrick* implicitly found that nothing about the language of the Safety Act provided a reliable indicium of a congressional intent to eliminate all forms of conflict preemption, whether through the operation of section 1397(k) or otherwise. *Myrick* involved truck air-brake systems and Safety Standard 121, rather than airbags and Safety Standard 208, but the trucking company petitioners in that case, like the petitioners here, argued that the respondents' common law tort claims were both expressly and impliedly preempted. In *Myrick*, after concluding that there was no express preemption because there was no existing federal Safety Standard addressing air brakes on trucks, this Court turned to the manufacturers' contention that the common law claims in issue were impliedly preempted. Unlike the New Hampshire court here, this Court in *Myrick* did not simply terminate the implied-preemption inquiry by concluding that no consideration of possible conflicts would be appropriate because section 1397(k) foreclosed any form of implied conflict preemption.

Instead, the Court considered whether there was a conflict and concluded that there was not. Specifically, this Court held that, under the facts of that case, it was not impossible for the petitioners to comply with both federal and state law, and the respondents' lawsuits could not be said to frustrate the acocmplishment and execution of the full purposes and objectives of Congress. The Court stated, "A finding of liability against petitioners would undermine no federal objectives or purposes with

respect to ABS devices, since none exist." *Myrick*, —— U.S. at ——, 115 S. Ct. at 1488. Thus, this Court conducted exactly the type of conflict-preemption analysis that the New Hampshire court now has said is constitutionally improper under the Safety Act.

3. *Failure to recognize that federal regulations can themselves effect implied conflict preemption*

The New Hampshire court's decision is inconsistent with this Court's implied-preemption decisions in yet another respect. By focusing exclusively on the Safety Act, and in particular on section 1397(k), the court incorrectly assumed that it is only federal statutes themselves that can impliedly preempt state law. This Court has made clear, however, that "statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 706 (1984). In this type of case, where "state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" *City of New York*, 486 U.S. at 64 (citation omitted). The New Hampshire court's failure to understand and apply this principle undoubtedly explains the court's failure to defer to, or even mention, the repeated explicit statements by the National Highway Traffic Safety Administration and the Department of Transportation of their intent to preempt "no-airbag" claims through Safety Standard 208.

4. *Failure to recognize that saving clauses do not preclude implied conflict preemption*

Even to the extent that section 1397(k) may be deemed to be an anti-preemption provision, the New Hampshire court's conclusion that the provision precludes all im-

plied conflict preemption is inconsistent with this Court's decisions establishing the inapplicability of saving clauses to that form of preemption. In a series of cases throughout this century, this Court has made clear that even saving clauses using the broader "Nothing in this act" anti-preemption language preclude only implied field preemption, not implied conflict preemption.

In *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), for example, the Court held that the Interstate Commerce Act precluded a common law action for damages, notwithstanding the Act's broad saving clause, which stated:

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

Recognizing the tension between the saving language and the broader purposes of the federal regulatory scheme, the Court held that the saving clause "cannot in reason be construed as continuing . . . a common law right" inconsistent with the underlyling federal aims. *Id.* at 446. *Accord Ouellette*, 479 U.S. at 492-94; *Kalo Brick*, 450 U.S. at 331; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915). Most recently, in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, —— U.S. ——, ——, 114 S. Ct. 517, 526 (1993), this Court again reaffirmed that, where such a saving clause exists, state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs."

The same holds true here. Given the explicit purpose of the National Highway Traffic Safety Administration and the Department of Transportation to promote federal motor vehicle safety policies by encouraging car manu-

facturers to provide a variety of passive restraint systems, not just airbags, it would be "extraordinary . . . to tolerate common-law suits" that would "undermine this regulatory structure." *Ouellette*, 479 U.S. at 497.

III. THE DECISION BELOW IS THE TYPE OF "NO-AIRBAG" DECISION THAT THE UNITED STATES HAS SUGGESTED SHOULD BE REVIEWED BY THIS COURT

In *Wood*, when this Court invited the United States to express its views as to whether the Court should review the First Circuit's decision holding a "no-airbag" claim preempted, the United States first observed that the First, Tenth, and Eleventh Circuits and three state appellate courts had at that time held "no-airbag" claims preempted and that no federal court of appeals or state court of last resort had held to the contrary. The Government then concluded, "[W]e believe that the Court should stay its hand and see whether a conflict on the preemption question hereafter develops among the federal courts of appeals or the state courts of last resort." United States Amicus Brief in *Wood* at 19. And, after noting that the vehicle at issue in *Wood* was manufactured in 1976, before the 1984 amendments to Safety Standard 208, the United States concluded, "Even then, the Court may prefer to resolve a case . . . involving a car as to which the 1984 version of [Safety Standard] 208 is applicable." *Id.*

This case presents just such a conflict between the federal courts of appeals and a state court of last resort, and this case involves just such a car as to which the 1984 version of Safety Standard 208 is applicable. In addition, the breadth of the conflict between those federal courts of appeals and various states' intermediate appellate courts and trial courts has greatly expanded since *Wood*. Therefore, now, even more than would have been the case had the Supreme Court of New Hampshire issued its decision in 1990, review by this Court is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2, 1995

APPENDICES

APPENDIX A

THE SUPREME COURT OF NEW HAMPSHIRE

Belknap
No. 93-751

JO-ANN TEBBETTS, ADMINISTRATRIX OF THE ESTATE OF REBECCA ANNE TEBBETTS

v.

FORD MOTOR COMPANY *& a.*

September 19, 1995

BATCHELDER, J. On May 15, 1991, Rebecca Anne Tebbetts was fatally injured in an automobile accident in Holderness. The plaintiff, Jo-Ann Tebbetts, administratrix of her daughter's estate, sued the defendants, Ford Motor Company and Robert H. Irwin Motors, Inc. (collectively Ford), alleging that the 1988 Ford Escort Rebecca was driving was defectively designed because it did not contain an airbag on the driver's side. Ford moved for summary judgment on the ground that the plaintiff's "no airbag" theory violated the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, and was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1988) (the Safety Act), and by Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1987) (Standard 208). The Superior Court (*O'Neil,*

J.) granted Ford's motion, ruling that the plaintiff's claim was impliedly preempted. We reverse and remand.

In response to escalating injuries and deaths from traffic accidents, Congress passed the Safety Act in 1966. *See State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 477 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). The Safety Act empowered the Secretary of Transportation to "establish . . . appropriate Federal motor vehicle safety standards," 15 U.S.C. § 1392(a), defined as "minimum standard[s] for motor vehicle performance, or motor vehicle equipment performance," 15 U.S.C. § 1391(2). Consequently, the secretary promulgated Standard 208 to "reduce the number of deaths of vehicle occupants, and the severity of injuries, . . . by specifying equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208. One method for meeting Standard 208's safety requirements for the 1988 model year was motorized automatic shoulder belts and manual lap belts, the option chosen for the Ford Escort Rebecca was driving.

The supremacy clause of article VI of the United States Constitution empowers Congress to preempt state law. Nevertheless, where the States have traditionally occupied a field, we must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

> [I]t is necessary to bear in mind . . . the circumspect view courts must take of a claim that Congress has preempted states from exercising their traditional police powers on behalf of their citizens. The provision of tort remedies to compensate for personal injuries is a subject matter of the kind the Court has traditionally regarded as properly within the scope of state superintendence.

Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1542 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) (quotation and brackets omitted).

Two provisions of the Safety Act are pertinent to our inquiry:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d) (the preemption clause). Additionally, section 1397(k) (the saving clause) provides, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." The issue before us is whether these provisions preempt the plaintiff's common law action.

State law is preempted by Federal law in three circumstances:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . .
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . .
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the

> Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements . . . .

English v. General Electric Co., 496 U.S. 72, 78-79 (1990) (quotation and ellipsis omitted).

The United States Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), clarified preemption analysis where a statute expressly addresses that issue.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

Id. at 2618 (quotations and citation omitted). Although "*Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption[,] it does not establish a rule." *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1488 (1995).

We first analyze the extent to which state law is explicitly preempted. *See English*, 496 U.S. at 78. The preemption clause prohibits a State from establishing a safety standard "which is not identical to the Federal standard." 15 U.S.C. § 1392(d). "A rule of the common law which permits the recovery of monetary damages for its breach self-evidently sets a standard and has been held to be a form of state regulation subject to the supremacy clause." *Cox v. Baltimore County*, 646 F. Supp. 761, 763 (D. Md. 1986). Although the language of the preemption clause alone might suggest that common law actions are preempted, we do not interpret the preemption clause in isolation. Rather we read the Safety Act as a whole, because "the meaning of statutory language, plain

or not, depends on context." *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1565 (1993) (quotation omitted). Hence we must interpret the preemption clause in tandem with the saving clause.

The saving clause provides that "[c]ompliance with *any* Federal motor vehicle safety standard . . . does not exempt any person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). "It is difficult to imagine broader language." *United States v. James*, 478 U.S. 597, 604 (1986). We therefore conclude that state common law is not explicitly preempted.

We next determine whether the Safety Act or its history "provides a reliable indicium of congressional intent with respect to state authority." *Cipollone*, 112 S. Ct. at 2618 (quotation omitted). "In determining whether a state cause of action is preempted by federal law, our sole task is to ascertain the intent of Congress." *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 318 (Pa. Super. 1989) (quotation omitted).

Although the original Senate version of the proposed Safety Act contained no saving clause, the committee report noted that compliance with federal standards would not preempt common law claims: "[T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." *S. Rep. No.* 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. The bill's sponsor, Senator Warren Magnuson, commented: "Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The comon law on product liability still remains as it was." 112 *Cong. Rec.* 14230 (1966).

An examination of the House committee report is equally instructive. By inserting the saving clause, the committee "intended . . . that compliance with safety

standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." *H.R. Rep. No.* 1776, 89th Cong., 2d Sess. 24 (1966).

We therefore determine that Congress intended the Safety Act to be "supplementary of and in addition to the common law of negligence and product liability." *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968). Having determined that the preemption clause when read in tandem with the saving clause "provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Cipollone*, 112 S. Ct. at 2618 (citation and quotation omitted).

Because we must construe the preemption clause narrowly in light of the presumption against the preemption of state police power regulations, *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993), and given the express utilization of the term "common law" in the saving clause, we agree with the analysis of those courts that have held that actions such as this are not preempted. *See, e.g., Gingold*, 567 A.2d at 330.

Ford argues that the majority of courts faced with a similar preemption inquiry have held common law actions preempted. *E.g., Wood v. General Motors Corp.*, 865 F.2d 395, 407-14 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). Had the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood*, Ford's argument would be more persuasive. *See* Chadwell, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141 (1994). As the plaintiff notes, however, "[w]hile it remains to be seen whether a jury in this case will find that Ford acted unreasonably, notwithstanding its alleged compliance with [Standard] 208, the issue before this court at this time is whether the plaintiff

has the right to ask the jury to decide." We hold that on these issues she does. *See Restatement (Second) of Torts* § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); W. Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue."). Accordingly, we reverse and remand.

Reversed and remanded.

All concurred.

APPENDIX B

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

BELKNAP, SS

JO-ANN TEBBETTS, Administratrix of
The Estate of Rebecca Ann Tebbetts
Young Road, Gilford, NH 03246,
Plaintiff,

v.

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Defendants.

ORDER ON DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

On May 15, 1991, Rebecca Ann Tebbetts (Decedent) was killed in an automobile accident while driving her 1988 Ford Escort. Plaintiff, the Administratrix of Decedent's estate, alleges that the 1988 Ford Escort, which Defendants placed in the stream of commerce, had an unreasonably dangerous and defective design in that it did not have a driver's side airbag. This design defect, according to Plaintiff, lead to Rebecca Ann Tebbetts' death. Defendants have moved for Summary Judgement as a matter of law stating that Plaintiff's claim violates the Supremacy Clause of the United States Constitution because it conflicts with the National Traffic and Motor

Vehicle Safety Act (the Safety Act) and with Federal Motor Vehicle Safety Standard 208.[1]

For a moving party to prevail at summary judgment, the Court must consider the evidence in the light most favorable to the non-moving party. *Green Mountain Insurance Co. v. Bonney*, 131 N.H. 762, 766 (1989). In addition, the pleadings, admissions, and affidavits must show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." N.H. RSA 491:8-a III; *Horse Pond Fish & Game Club v. Cormier*, 133 N.H. 648, 653 (1990). Defendants have met this standard.

Plaintiff's and Defendants' arguments revolve around two clauses in the Safety Act. Defendants claim that the Safety Act's preemption clause expressly preempts all conflicting state regulatory standards, including common law negligence claims.[2] Plaintiff, however, claims the Safety Act's savings clause protects an individual's right to sue an auto manufacturer for negligent design even if the manufacturer followed the federal regulations.[3]

---

[1] In 1966, Congress enacted the Safety Act. The Safety Act required the Secretary of Transportation to promulgate the Federal Motor Vehicle Safety Standards. When the Tebbetts Escort was built, Standard 208 required all cars have either airbags or automatic safety belts. The Tebbetts' Escort had authorized safety belts.

[2] The preemption clause states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish . . . . any safety standard applicable to the same aspect of performance of such vehicle or item of equipment, which is not identical to the federal standard. 15 U.S.C. § 1392(d).

[3] The savings clause states:

> Compliance with any Federal Motor Vehicle Safety Standard issued under this subchapter does not exempt any person from any liability under common law. 15 U.S.C. sec. 1397(c).

While courts have almost unanimously concluded that the Safety Act does not expressly preempt common law claims against automobile manufacturers, those same courts have found that such claims are impliedly preempted.[4] *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1120-25 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824, 827 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395, 402, 411 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). Common law liability claims must be preempted, otherwise the courts will be "establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress." *Wood v. General Motors Corp., supra* at 402. Where common law claims "directly undermine" and "frustrate the federal regulatory scheme," they must be preempted. *Pokorny v. Ford Motor Co., supra* at 1124; *Taylor v. General Motors Corp., supra* at 827. This reasoning has recently been reanalyzed and upheld. *Gills v. Ford Motor Co.*, No. C91-0256-P(H) (W.D. Ky. Sept. 1, 1993).

Plaintiff asserts that the savings clause supersedes the preemption clause and provides an avenue for Plaintiff's suit. Congress writes savings clauses, however, to indicate where legislation does not entirely withdraw a topic from a state jurisdiction. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). In the face of a savings clause, states may still regulate, but only in ways consistent with the purposes of the federal statute. *Pennsylvania Railroad v. Puritan Coal Mining*

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[4] The preemption clause forbids states from establishing "safety standards" that conflict with the Safety Act. It has long been held that damage awards under common law can constitute state regulations. *San Diego Bldg. Trades Council v. Garmon*, 79 S. Ct. 773, 780 (1959).

Co., 237 U.S. 121, 129-30 (1915). Thus, in this case, the savings clause cannot be invoked by Plaintiff to protect their suit. As the Supreme Court noted:

> It would be extraordinary for Congress, after devising an elaborate . . . system that sets clear standards, to tolerate common-law suits that have the potential to undermine regulatory structure.

International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987).

Public statements emanating from both Congress and the Department of Transportation which relate to preemption support Defendants position. Both branches of the government were concerned with national uniformity in automobile regulations and wanted to offer manufacturers flexibility in designing safety features. 52 Fed. Reg. 42440, 42441-44 (Nov. 5, 1987); 49 Fed. Reg. 28962, 29000-01 (July 17, 1984); S. Rep. No. 1301, 89th Cong., 2d Sess. 12, *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. If common law claims are tried in courts across the country, the goals and purposes of the Safety Act will be compromised.

Because the issues raised in this case have been extensively discussed by the above cited courts and because this Court finds itself in agreement with those decisions, this court will not rehash that discussion any further. In conclusion, the Court echos Judge Heyburn's exiting ruminations:

> If the federal regulations requiring a choice of safety features do not impliedly or expressly shield a manufacturer from liability for making the very choice mandated, then the Safety Act has little purpose or any reason for being. The Court will not presume that Congress intended such an unfair result from its regulation. *Gills v. Ford Motor Co., supra.*

Accordingly, Defendant's Motion for Summary Judgment is GRANTED.

So ORDERED.

Date: 10-14-93

/s/ William J. O'Neil
WILLIAM J. O'NEIL
Presiding Justice

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

MOTOR VEHICLE SAFETY

49 U.S.C. § 30103. Relationship to other laws

(a) Uniformity of regulations.—The Secretary of Transportation may not prescribe a safety regulation related to a motor vehicle subject to subchapter II of chapter 105 of this title that differs from a motor vehicle safety standard prescribed under this chapter. However, the Secretary may prescribe, for a motor vehicle operated by a carrier subject to subchapter II of chapter 105, a safety regulation that imposes a higher standard of performance after manufacture than that required by an applicable standard in effect at the time of manufacture.

(b) Preemption.—**(1)** When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

(c) Antitrust laws.—This chapter does not—

(1) exempt from the antitrust laws conduct that is unlawful under those laws; or

(2) prohibit under the antitrust laws conduct that is lawful under those laws.

(d) Warranty obligations and additional legal rights and remedies.—Sections 30117(b), 30118-30121, 30166(f), and 30167(a) and (b) of this title do not establish or affect a warranty obligation under a law of the United States or a State. A remedy under those sections and sections 30161 and 30162 of this title is in addition to other rights and remedies under other laws of the United States or a State.

(e) Common law liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

(Added Pub. L. 103-272, § 1(e), July 5, 1994, 108 Stat. 943.)

§ 571.208 Standard No. 208; Occupant crash protection.

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9., *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S4.1 *Passenger cars.*

S4.1.1 *Passenger cars manufactured from January 1, 1972, to August 31, 1973.* Each passenger car manufactured from January 1, 1972, to August 31, 1973, inclusive, shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.1.1.3. A protection system that meets the requirements of S4.1.1.1, or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3.

S4.1.1.1 *First option—complete passive protection system.* The vehicle shall meet the crash protection requirements of S5. by means that require no action by vehicle occupants.

S4.1.1.2 *Second option—lap belt protection system with belt warning.* The vehicle shall—

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3.

S4.1.2 *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option—frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any

Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 or S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.*

S4.1.3.1 *Passengers cars manufactured on or after September 1, 1986, and before September 1, 1987.*

S4.1.3.1.1 Subject to S4.1.3.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars, specified in S4.1.3.1.1 complying with the requirements of S4.1.2.1 shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.1.1.

S4.1.3.1.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.1.2(a) or its annual production under S4.1.3.1.2(b).

S4.1.3.2 *Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.*

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.2.1 complying with the requirements of S4.1.2.1, shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.2.1.

S4.1.3.2.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.2.2(a) or its annual production under S4.1.3.2.2(b).

S4.1.3.3 *Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.*

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.3.1 complying with the requirements of S4.1.2.1 shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.3.1.

S4.1.3.3.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.3.2(a) or its annual production under S4.1.3.3.2(b).

S4.1.3.4 *Calculation of complying passenger cars.*

(a) For the purposes of calculating the numbers of cars manufactured under S4.1.3.1.2, S4.1.3.2.2, or S4.1.3.3.2 to comply with S4.1.2.1:

(1) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose front right seating position will comply with the requirements of S4.1.2.1(a) by any means is counted as 1.5 vehicles, and

(2) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not in-

cluding any type of seat belt and whose right front seat seating position is equipped with a manual Type 2 seat belt is counted as one vehicle.

* * * *

S4.1.4 Passenger cars manufactured on or after September 1, 1989, but before September 1, 1996.

S4.1.4.1 Except as provided in S4.1.4.2, each passenger car manufactured on or after September 1, 1989 shall comply with the requirements of S4.1.2.1. Any passenger car manufactured on or after September 1, 1989 and before September 1, 1993 whose driver's designated seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front designated seating position is equipped with a manual Type 2 seat belt so that the seating position complies with the occupant crash protection requirements of S5.1, with the Type 2 seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not know in the exercise of due care that such vehicle is not in conformity with this standard.

S4.1.4.2 (a) Each passenger car, other than a convertible, manufactured before December 11, 1989 may be equipped with, and each passenger car, other than a convertible, manufactured on or after December 11, 1989 and before September 1, 1990 shall be equipped with a Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed pursuant to this provision shall comply with Standard No. 209 (49 CFR 571.209) and with S7.1.1 of this standard.

(b) Except as provided in S4.1.4.2.1 and S4.1.4.2.2, each passenger car, other than a convertible, manufactured on or after September 1, 1990 and each convertible

passenger car manufactured on or after September 1, 1991 shall be equipped with an integral Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed in compliance with this requirement shall comply with Standard No. 209 (49 CFR 571.209) and with S7.1 and S7.2 of this standard. If a Type 2 seat belt assembly installed in compliance with this requirement incorporates any webbing tension-relieving device, the vehicle owner's manual shall include the information specified in S7.4.2(b) of this standard for the tension relieving device, and the vehicle shall comply with S7.4.2(c) of this standard.

(c) As used in this section, "rear outboard designated seating position" means any "outboard designated seating position" (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating position adjacent to a walkway that is located between the seat and the near side of the vehicle and is designed to allow access to more rearward seating positions.

* * * *

S4.1.5 *Passenger cars manufactured on or after September 1, 1996.*

S4.1.5.1 *Frontal/angular automatic protection system.*

(a) Each passenger car manufactured on or after September 1, 1996 shall:

(1) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(2) At any front designated seating positions that are not "outboard designated seating positions," as that term is defined at 49 CFR 571.3, and at any rear designated seating positions that are not "rear outboard designated seating positions," as that term is defined at S4.1.4.2(c)

of this standard, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 and S7.2 of this standard; and

(3) At each front designated seating position that is an "outboard designated seating position," as that term is defined at 49 CFR 571.3, and at each rear designated seating position that is a "rear outboard designated seating positions," as that term is defined at S4.1.4.2(c) of this standard, have a Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3 of this standard, and, in the case of the Type 2 seat belt assemblies installed at the front outboard designated seating positions, meet the frontal crash protection requirements with the appropriate anthropomorphic test dummy restrained by the Type 2 seat belt assembly in addition to the means that requires no action by the vehicle occupant.

(b) For the purposes of this section, an *inflatable restraint system* means an air bag that is activated in a crash.

S4.1.5.2 *Passenger cars manufactured on or after September 1, 1996 and before September 1, 1997.*

S4.1.5.2.1 The amount of passenger cars complying with the requirement of S4.1.5.1(a)(1) by means of an inflatable restraint system at the driver's and right front passenger's position shall be not less than 95 percent of the manufacturer's total production of passenger cars manufactured on or after September 1, 1996, and before September 1, 1997. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

* * * *

S4.1.5.3 *Passenger cars manufactured on or after September 1, 1997.* Each passenger car manufactured on or after September 1, 1997 shall comply with the re-

quirement of S4.1.5.1(a)(1) by means of an inflatable restraint system at the driver's and right front passenger's position. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

* * * *

S4.5.3 *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4, and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1 An automatic belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly. An automatic belt may not be used pursuant to S4.5.3 to meet the requirements of S4.1.5.1(a)(3) for a Type 2 seat belt assembly at any seating position equipped with an inflatable restraint system pursuant to S4.1.5.2, S4.1.5.3, S4.2.6.1, or S4.2.6.2 of this standard.

S4.5.3.2 An automatic belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

S4.5.3.3 An automatic belt furnished pursuant to S4.5.3 shall:

(a) Conform to S7.1 and have a single emergency release mechanism whose components are readily accessible to a seated occupant.

(b) In place of a warning system that conforms to S7.3 of this standard, be equipped with the following

warning system: At the left front designated seating position (driver's position), a warning system that activates a continuous or intermittent audible signal for a period of not less than 4 seconds and not more than 8 seconds and that activates a continuous or flashing warning light visible to the driver for not less than 60 seconds (beginning when the vehicle ignition switch is moved to the "on" or the "start" position) when condition (A) exists simultaneously with condition (B), and that activates a continuous or flashing warning light, visible to the driver, displaying the identifying symbol for the seat belt telltale shown in Table 2 of Standard No. 101 (49 CFR 571.101), or, at the option of the manufacturer if permitted by Standard No. 101, displaying the words "Fasten Seat Belts" or "Fasten Belts," for as long as condition (A) exists simultaneously with condition (C).

(A) The vehicle's ignition switch is moved to the "on" position or to the "start" position.

(B) The driver's automatic belt is not in use, as determined by the belt latch mechanism not being fastened, or, if the automatic belt is non-detachable, by the emergency release mechanism being in the released position. In the case of motorized automatic belts, the determination of use shall be made once the belt webbing is in its locked protective mode at the anchorage point.

(C) The belt webbing of a motorized automatic belt system is not in its locked, protective mode at the anchorage point.

S4.5.3.4 An automatic belt furnished pursuant to S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of S5.1 shall conform to the webbing, attachment hardware, and assembly performance requirements of Standard No. 209.

§ 571.208 Standard No. 208; Occupant crash protection.

S1. *Scope.* This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. *Purpose.* The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. *Application.* This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9., *Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. *General requirements.*

S4.1 *Passenger cars.*

S4.1.1 *Passenger cars manufactured from January 1, 1972, to August 31, 1973.* Each passenger car manufactured from January 1, 1972, to August 31, 1973, inclusive, shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.1.1.3. A protection system that meets the requirements of S4.1.1.1, or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3.

S4.1.1.1 *First option—complete passive protection system.* The vehicle shall meet the crash protection requirements of S5, by means that require no action by vehicle occupants.

S4.1.1.2 *Second option—lap belt protection system with belt warning.* The vehicle shall—

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1 in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3.

S4.1.2 *Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986.* Each pasenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 *First option—frontal/angular automatic protection system. The vehicle shall:*

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) *Either.* (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper

torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2. *Second option—head-on automatic protection system.* The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 *Third option—lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that con-

forms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.*

S4.1.3.1 *Passenger cars manufactured on or after September 1, 1986, and before September 1, 1987.*

S4.1.3.1.1 Subject to S4.1.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars, specified in S4.1.3.1.1 complying with the requirements of S4.1.2.1 shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.1.1.

S4.1.3.1.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.1.2(a) or its annual production under S4.1.3.1.2(b).

S4.1.3.2 *Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.*

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.2.1 complying with the requirements of S4.1.2.1, shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.2.1.

S4.1.3.2.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.2.2(a) or its annual production under S4.1.3.2.2(b).

S4.1.3.3 *Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.*

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with

the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.3.1 complying with the requirements of S4.1.2.1 shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.3.1.

S4.1.3.3.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.3.2(a) or its annual production under S4.1.3.3.2(b).

S4.1.3.4 *Calculation of complying passenger cars.*

(a) For the purposes of calculating the numbers of cars manufactured under S4.1.3.1.2, S4.1.3.2.2, or S4.1.3.3.2 to comply with S4.1.2.1:

(1) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose front right seating position will comply with the requirements of S4.1.2.1(a) by any means is counted as 1.5 vehicles, and

(2) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front seat seating position is equipped with a manual Type 2 seat belt is counted as one vehicle.

* * * *

S4.1.4 *Passenger cars manufactured on or after September 1, 1989.* Except as provided in S4.1.5, each passenger car manufactured on or after September 1, 1989, shall comply with the requirements of S4.1.2.1. Until September 1, 1993, each car whose driver's designated seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front designated seating position is equipped with a manual Type 2 seat belt that meets the requirements of S5.1, with the Type 2 seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.5 *Mandatory seatbelt use laws.*

S4.1.5.1 If the Secretary of Transportation determines, by not later than April 1, 1989, that state mandatory safety belt usage laws have been enacted that meet the criteria specified in S4.1.5.2 and that are applicable to not less than two-thirds of the total population of the 50 states and the District of Columbia (based on the most recent Estimates of the Resident Population of States, by Age, Current Population Reports, Series P-25. Bureau of the Census), each passenger car manufactured under S4.1.3 or S4.1.4 on or after the date of that determination shall comply with the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3.

S4.1.5.2 The minimum criteria for state mandatory safety belt usage laws are:

(a) Require that each front seat occupant of a passenger car equipped with safety belts under Standard No. 208 has a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion.

(b) If waivers from the safety belt usage requirement are to be provided, permit them for medical reasons only.

(c) Provide for the following enforcement measures:

(1) A penalty of not less than $25.00 (which may include court costs) for each occupant of a car who violates the belt usage reqiurement.

(2) A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

(3) A program to encourage compliance with the belt usage requirement.

(d) An effective date of not later than September 1, 1989.

* * * *

S4.5.3 *Automatic belts.* Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4, and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1 An automatic belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly.

S4.5.3.2 An automatic belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

S4.5.3.3 An automatic belt furnished pursuant to S4.5.3 shall:

(a) Conform to S7.1 and have a single emergency release mechanism whose components are readily accessible to a seated occupant.

(b) In place of a warning system that conforms to S7.3 of this standard, be equipped with the following warning system: At the left front designated seating position (driver's position), a warning system that activates a continuous or intermittent audible signal for a period of not less than 4 seconds and not more than 8 seconds and that activates a continuous or flashing warning light visible to the driver for not less than 60 seconds (beginning when the vehicle ignition switch is moved to the "on" or the "start" position) when condition (A) exists simultaneously with conditions (B), and that activates a continuous or flashing warning light, visible to the driver, displaying the identifying symobl for the seat belt telltale shown in Table 2 of Standard No. 101 (49 CFR 571.101), or, at the option of the manufacturer if permitted by Standard No. 101, displaying the words "Fasten Seat Belts" or "Fasten Belts," for as long as condition (A) exists simultaneously with condition (C).

(A) The vehicle's ignition switch is moved to the "on" position or to the "start" position.

(B) The driver's automatic belt is not in use, as determined by the belt latch mechanism not being fastened, or, if the automatic belt is non-detachable, by the emergency release mechanism being in the released position. In the case of motorized automatic belts, the determination of use shall be made once the belt webbing is in its locked protective mode at the anchorage point.

(C) The belt webbing of a motorized automatic belt system is not in its locked, protective mode at the anchorage point.

S4.5.3.4 An automatic belt furnished pursuant to S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of S5.1 shall conform to the webbing, attachment hardware, and assembly performance requirements of Standard No. 209.

APPENDIX D

Decisions Finding Preemption Under Safety Standard 208

Federal

1. *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. Mar. 28, 1986)
2. *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. Sept. 26, 1986) (Ford)
3. *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio Oct. 31, 1986)
4. *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. Jan. 5, 1987)
5. *Staggs v. Chrysler Corp.*, 687 F. Supp. 270 (N.D. Ga. Jan. 25, 1987)
6. *Vasquez v. Ford Motor Co.*, No. CIV 86-0657 PHX WPC (D. Ariz. Feb. 19, 1987)
7. *Wattelet v. Toyota Motor Co.*, 676 F. Supp. 1039 (D. Mont. Apr. 27, 1987)
8. *Donnelly v. General Motors Corp.*, No. 86-576-JU (D. Or. Aug. 3, 1987)
9. *Distler v. General Motors Corp.*, No. 4-86-821 (D. Minn. Sept. 3, 1987)
10. *Bass v. General Motors Corp.*, No. SA-86-CA-279 (W.D. Tex. Sept. 14, 1987)
11. *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. Dec. 15, 1987)
12. *Ritt v. General Motors Corp.*, No. 86-C-1737 (N.D. Ill. Jan. 20, 1988)
13. *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. Feb. 13, 1988)
14. *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. Feb. 18, 1988)

15. *Heftel v. General Motors Corp.*, No. 85-1713 (D.D.C. Feb. 23, 1988)

16. *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. May 10, 1988)

17. *Howard v. American Motors Corp.*, No. 85-1754 (S.D. Tex. July 26, 1988)

18. *Rodriguez v. General Motors Corp.*, No. CV 88-3361 SWV(GX) (C.D. Cal. Oct. 4, 1988)

19. *Hunter v. General Motors Corp.*, No. H-86-546 (TEC) (D. Conn. Nov. 23, 1988)

20. *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. Dec. 28, 1988), *cert. denied*, 494 U.S. 1065 (1990)

21. *Falk v. Chrysler Corp.*, No. R87-1057 (D. Md. Feb. 23, 1989)

22. *Hunt v. Ford Motor Co.*, No. CV-88-AR-1756-M (N.D. Ala. Mar. 30, 1989)

23. *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. May 19, 1989), *cert. denied*, 494 U.S. 1065 (1990)

24. *Richart v. Ford Motor Co.*, 875 F.2d 787 (10th Cir. May 19, 1989), *cert. denied*, 494 U.S. 1065 (1990)

25. *Taylor v. Ford Motor Co.*, 875 F.2d 816 (11th Cir. June 14, 1989), *cert. denied*, 494 U.S. 1065 (1990)

26. *Dallas v. General Motors Corp.*, 725 F. Supp. 908 (W.D. Tex. Sept. 22, 1989)

27. *Nadeau v. Ford Motor Co.*, No. 89-30315 (N.D. Fla. Jan. 3, 1990)

28. *Purdy v. Ford Motor Co.*, No. 89-30314 (N.D. Fla. Jan. 3, 1990)

29. *Weinstein v. Ford Motor Co.*, No. 4:89-2590.15 (D.S.C. Feb. 9, 1990)

30. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir. Apr. 30, 1990), *cert. denied*, 498 U.S. 853 (1990)

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36. *Chu Shin Pak v. Chrysler Motor Corp.*, No. 90-3447 (E.D. Pa. Dec. 4, 1990), *aff'd*, No. 91-1112 (3rd Cir. July 3, 1991)

37. *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. Jan. 8, 1991)

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48. *Easley v. Ford Motor Co.*, No. 6:95-CV-00026 (E.D. Okla. May 31, 1995) (based on plaintiff's failure to oppose)

49. *Basey v. General Motors Corp.*, No. 2:93-CV-01413 (D. Ariz. June 5, 1995)

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21. *Mazey v. General Motors Corp.*, No. A 243881 (Nev. Dist. Ct. Dec. 6, 1988)

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27. *Noone v. Oldsmobile Div. of General Motors Corp.*, No. 85-68704 (Tex. Dist. Ct. Jan. 24, 1989)

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39 *Abbott v. Ford Motor Co.*, No. L 10846-87 (N.J. Super. Ct. Mar. 14, 1990)

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55. *Jeschke v. Canton Motors, Inc.,* No. 88-520 (Tex. Dist. Ct. Jan. 7, 1991) (General Motors)

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63. *McInroe v. Ford Motor Co.,* No. 91-0004-E (Tex. Dist. Ct. Apr. 23, 1992)

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65. *Cooper v. General Motors Corp.,* No. 3773 (Miss. Cir. Ct. Sept. 18, 1992), *appeal filed*

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72. *Jenkins v. Mitsubishi Motor Co.*, No. RCV 56635 (Cal. Super. Ct. Aug. 31, 1993)

73. *Lara v. Bustos, Hyundai Motor Am.*, No. VC 00789 (Cal. Super. Ct. Oct. 5, 1993)

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33. *Hernandez-Gomez v. Leonarde*, 884 P.2d 183 (Ariz. Nov. 1, 1994), *vacated and remanded sub nom. Volkswagen of Am., Inc. v. Hernandez-Gomez*, —— U.S. ——, 115 S. Ct. 1819 (1995)

34. *Blakely v. Ford Motor Co.*, No. 4031 (Pa. Ct. C.P. Feb. 1, 1995)

35. *Alvarado v. Hyundai Motor Co.*, —— S.W.2d ——, 1995 WL 468366 (Tex. Ct. App.—Austin Aug 9, 1995)

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(2)

Supreme Court, U.S.
FILED
DEC 4 1995
CLERK

No. 95-709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Ford Motor Company and
Robert H. Irwin Motors, Inc.,

Petitioners,

v.

Jo-Ann Tebbetts, Administratrix of the Estate of
Rebecca Anne Tebbetts,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of New Hampshire

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Supreme Court of New Hampshire's unanimous ruling that the Ford Motor Company's compliance with a Federal motor vehicle safety standard issued pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 ("the Safety Act") does not exempt Ford from liability under state common law when: (1) the ruling is the first issued by a state court of last resort or a U.S. court of appeals on the preemptive effect of the Safety Act since this court decided *Cipollone v. Liggett Group, Inc.*, and *Freightliner Corp. v. Myrick*, and (2) the Safety Act explicitly says "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

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STATEMENT OF THE CASE

On May 15, 1991, the 1988 Ford Escort that Rebecca Anne Tebbetts was driving hit a rock, swerved off the road, and ran into a tree. The car was equipped with a manual lap belt, which Rebecca had connected, and a motorized shoulder harness, but it was not equipped with a driver's-side air bag. The lap belt and shoulder harness restrained Rebecca to some extent, but she still hit the steering wheel with such force that she died.

On January 29, 1993, Rebecca's mother, serving as the administratrix of her estate, filed this suit under New Hampshire common law against the Ford Motor Company and Robert H. Irwin Motors, Inc. (collectively "Ford"), alleging that the 1988 Ford Escort driven by Rebecca was negligently designed because it lacked a driver's-side airbag. The suit further alleges that, if the car had contained a driver's-side airbag, Rebecca would have survived the crash.

When the 1988 Ford Escort driven by Rebecca Tebbetts was manufactured, federal regulations promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 ("the Safety Act") -- specifically, Federal motor vehicle safety standard 208 -- did not prohibit Ford from installing airbags in the Ford Escort or any other car. Standard 208 did, however, require Ford to install some form of passive restraint in at least 25 percent of its 1988 model-year cars. 49 C.F.R. § 571.208. It also required all cars to have, at a minimum, either a manual lap belt and shoulder harness, a manual lap belt and motorized shoulder harness, or an airbag or other device that provided automatic protection to vehicle occupants. *Id.* In this case, the complaint alleges that Ford acted negligently by failing to do more than the minimum that Standard 208 required.

On August 11, 1993, Ford moved for summary judgment asserting that, even if all of the allegations in this case are true, Ford's compliance with Standard 208 exempts it from liability under New Hampshire common law. Two months later, the trial court granted Ford's motion. Relying heavily on four federal

appeals court rulings issued before this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) ("*Cipollone*"), the trial court held that plaintiff's claims are impliedly preempted. Petitioners' Appendix ("Pet. App.") at 10a.

On appeal, the Supreme Court of New Hampshire unanimously reversed. In a decision issued on September 19, 1995, it briefly reviewed the facts and the applicable law, taking special note of this Court's recent decisions clarifying preemption analysis in *Cipollone* and *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) ("*Myrick*"). In accordance with those decisions, the Supreme Court of New Hampshire then addressed the issues of express and implied preemption.

On the issue of express preemption, the Court held that Congress had made its intent clear by enacting the Safety Act's saving clause, 15 U.S.C. § 1397(k).[1] That section provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* The Court acknowledged that the Safety Act also contains an express preemption clause which prohibits a State from establishing a safety standard "which is not identical to the Federal standard," Pet. App. at 4a (quoting 15 U.S.C. § 1392(d)), and that "[a] rule of the common law which permits the recovery of monetary damages for its breach self-evidently sets a standard. . ." Pet. App. at 4a. It said, however, that the preemption clause could not be "read in isolation" and had to be interpreted "in tandem with the saving clause." *Id.* at 4a-5a. Emphasizing the unequivocal wording of the saving clause, the

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[1]The Safety Act, 15 U.S.C. §§ 1381 *et seq.*, and other statutes governing transportation were recently recodified "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). As a result, what was 15 U.S.C. § 1397(k) is now 49 U.S.C. § 30103(e). All of the applicable preemption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. For convenience, this brief uses the citations employed in those decisions.

Court said, "It is difficult to imagine broader language." Pet. App. at 5a (quoting *United States v. James*, 478 U.S. 597, 604 (1986)). It, therefore, held that "state common law is not explicitly preempted." Pet. App. at 5a.

On the issue of implied preemption, the New Hampshire Supreme Court recognized that this Court's decision in *Cipollone* "clarified preemption analysis" by stating as follows:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

Pet. App. at 4a (quoting *Cipollone*, 112 S. Ct. at 2618). The New Hampshire Supreme Court also recognized the teaching of this Court's then five-month-old decision in *Myrick* that "*Cipollone* supports an inference that an express preemption clause forecloses implied pre-emption[,] it does not establish a rule." Pet. App. at 4a (quoting *Myrick*, 115 S. Ct. at 1488).

Based on the foregoing, the Court stated that its first task with respect to implied preemption was to determine whether the Safety Act or its legislative history "provides a reliable indicium of congressional intent with respect to state authority." Pet. App. at 5a (quoting *Cipollone*, 112 S. Ct. at 2618). After reviewing the legislative history, it determined that, by inserting the saving clause, Congress intended, in the words of the House committee report, "that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." Pet. App. at 6 (quoting H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966)).

Given the clarity of the Safety Act's language and legislative history, the New Hampshire Supreme Court concluded that, under *Cipollone*, there was no reason to consider the issue of implied preemption further. It said:

> Having determined that the preemption clause when read in tandem with the saving clause "provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." *Cipollone,* 112 S. Ct. at 2618 (citation and quotation omitted).

Pet. App. at 6a. The Court acknowledged Ford's argument "that the majority of courts faced with a similar preemption inquiry have held common law actions preempted," citing *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) (finding no express preemption, but implied preemption, of common law claims). Pet. App. at 6a. But it found those implied preemption decisions unconvincing because of this Court's intervening decision in *Cipollone*. "Had the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood,*" the Court said, "Ford's argument would be more persuasive." Pet. App. at 6a.

"[W]hile it remains to be seen whether a jury in this case will find that Ford acted unreasonably, notwithstanding its alleged compliance with Standard 208," the Court concluded, "the issue before this court at this time is whether the plaintiff has a right to ask the jury to decide. We hold that on these issues she does." *Id.* (quotation marks and brackets omitted). Ford now seeks review by this Court to prevent any trial from taking place.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW CREATES NO CONFLICT BECAUSE IT IS THE FIRST RULING ISSUED BY A STATE COURT OF LAST RESORT OR A U.S. COURT OF APPEALS ON THE PREEMPTIVE EFFECT OF THE SAFETY ACT SINCE THIS COURT CLARIFIED THE LIMITS ON IMPLIED PREEMPTION ANALYSIS IN *CIPOLLONE* AND *MYRICK*.

Ford's primary argument is that review is necessary because the decision below directly conflicts with *Wood*, 865 F.2d 395, and three other federal appeals court decisions finding common law claims involving passive restraints impliedly, but not expressly, preempted -- *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.* 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp*, 875 F.2d 878 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). As the Supreme Court of New Hampshire found, if this Court had not "clarified preemption analysis in *Cipollone* subsequent to *Wood* [and the other decisions], Ford's argument would be more persuasive." Pet. App. at 6a.

The Supreme Court of New Hampshire's decision creates no conflict because it is the first ruling issued by a state court of the last resort or a federal appeals court on the Safety Act's preemptive effect since this Court clarified the limits on implied preemption analysis in *Cipollone* and *Myrick*. There is no good reason to review this decision at this time. The Supreme Court of New Hampshire's ruling is wholly consistent with the unanimous appellate rulings issued during the Safety Act's first twenty years, before the Third Circuit improperly expanded implied preemption in *Cipollone*. The four federal appeals court implied preemption decisions (and others) relied upon by Ford are of no moment. They were issued before this Court rejected the Third Circuit's

approach in *Cipollone* and do not establish an existing conflict. To the contrary, as the history of *Myrick* reflects, they will inevitably be reconsidered (and should properly be rejected) in light of this Court's recent rulings. To demonstrate these points, a brief review of the cases interpreting the Safety Act's preemptive effect is in order.

The Safety Act was enacted in 1966. Over the next twenty years, eight federal appeals courts and five state courts of last resort addressed the issue of whether compliance with Federal motor vehicle safety standards exempts auto manufacturers from liability in design defect cases. Each reached the same conclusion: Congress's words mean what they say -- "Compliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).[2]

In 1986, however, the U.S. Court of Appeals for the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d. Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992), expanding the implied preemption doctrine to find certain common law claims involving cigarettes preempted despite Congress's intent to the contrary. Within a

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[2]*See Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1198 (Ala. 1985); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (1976); *Arbet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 438 (1976).

year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

Before this Court had an opportunity to overturn these decisions, the defective strain of implied preemption analysis adopted in the cigarette cases infected the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood,* 865 F.2d 395, in which General Motors was, once again, arguing that it was exempt from common law liability because it had complied with a Federal motor vehicle safety standard -- specifically, Standard 208 governing occupant restraints. In a two-to-one decision, with Judge Selya dissenting, the First Circuit explicitly adopted the rationale of *Palmer,* its recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim impliedly preempted by the Safety Act, despite Congress's clear statement of anti-preemptive intent. *Wood,* 865 F.2d at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, issuing the other implied preemption decisions relied on by Ford. *See supra* at 5.

In 1992, however, this Court issued its decision in *Cipollone*, explicitly rejecting the Third Circuit's (and its sister courts') expansion of the implied preemption doctrine. In a portion of the opinion joined by seven members of this Court, it said:

> In our opinion, the pre-emptive scope of the [two statutes at issue] is governed entirely by the express language in . . . each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions

> of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

112 S. Ct. at 2618.[3]

Cipollone's clarification of the limits of implied preemption analysis effectively invalidated the decisions finding implied preemption under the Safety Act. Since *Cipollone*, one federal court of appeals and two state courts of last resort have considered the Safety Act's preemptive effect on common law claims. All three have found no preemption.

In the first such case, *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub. nom on other grounds Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), the Eleventh Circuit held that *Cipollone* negated its prior implied preemption decision in *Taylor* and that the Safety Act expressly preserved the common law claims at issue. Upon review, this Court said that the Eleventh Circuit had misread *Cipollone* to hold that implied preemption is barred whenever Congress includes an express preemption clause in a statute. *Myrick*, 115 S. Ct. at 1487. The Court clarified the proper approach to preemption analysis, saying:

> The fact that an express definition of the pre-

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[3]In language particularly relevant to preemption analysis under the Safety Act, this Court added: "[T]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1985, Congress expressly pre-empted State or local imposition of a 'statement relating to the use of smokeless tobacco products and health' but, at the same time, preserved state law damages actions based on those products." *Id.* (footnote omitted).

> emptive reach of a statute "implies" -- i.e., supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption . . . At best, *Cipollone* supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.

Myrick, 115 S. Ct. at 1488. This Court did not address the Eleventh Circuit's holding that, under *Cipollone*, section 1397(k) constitutes such a "reliable indicium of congressional intent" that it precludes a finding of implied preemption under the Safety Act. *See Myrick*, 13 F.3d at 1525-27, 115 S. Ct. at 1487 n.3. Instead, this Court unanimously affirmed the Eleventh Circuit's finding of no preemption on the ground that there was no relevant Federal motor vehicle safety standard in effect. *Id.* at 1485-88.[4]

The Supreme Court of Arizona also considered the Safety Act's preemptive effect after this Court decided *Cipollone*, but before this Court decided *Myrick*. Relying in part on the Eleventh Circuit's decision in *Myrick*, the Supreme Court of Arizona unanimously held in *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Az. 1994), *vacated and remanded*, 115 S. Ct. 1819 (1995), that the Safety Act does not preempt a state common law claim against a car manufacturer for failing to incorporate a

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[4]Ford's assertion that this Court's clarification of preemption analysis in *Myrick* somehow reinstated *Taylor* as the law of the Eleventh Circuit is meritless. This Court made clear in *Myrick* that implied preemption analysis is not necessarily foreclosed when Congress has enacted an express preemption clause that "implies", but leaves open the question of whether, "other matters" are preempted. 115 S. Ct. at 1488. In the Safety Act, however, Congress enacted an express *anti-preemption* clause that explicitly preserves common law claims. *Cipollone* and *Myrick* both demonstrate that, when such a "reliable indicium of congressional intent" exists, the courts cannot contravene Congress's statement through use of the implied preemption doctrine. That is exactly what *Taylor* did; it is no longer good law.

lap belt into its passive restraint system. After this Court issued its decision in *Myrick*, it vacated the Arizona Supreme Court's decision in *Hernandez-Gomez* and remanded that case for reconsideration in light of its ruling.

The decision by the Supreme Court of New Hampshire in this case is, therefore, the first ruling by a state court of last resort or a federal appeals court on the Safety Act's preemptive effect since this Court issued both *Cipollone* and *Myrick*. It should not be reviewed at this time because no true conflict exists. Indeed, there has not been sufficient time since *Cipollone* and *Myrick* to see if such a conflict will develop. This Court has repeatedly declined to review federal appeals court decisions interpreting the preemptive effect of other federal statutes on common law claims, even when clear pre-and/or-post-*Cipollone* conflicts exist, allowing the federal circuits and the state courts of last resort to explore and debate the significance of *Cipollone* and *Myrick* statute-by-statute, without early intervention by this Court. *Compare, e.g., Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.) (federal pesticide legislature expressly preempts common law claims), *cert. denied,* 114 S. Ct. 300 (1993), *with Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.) (federal pesticide legislation neither expressly nor impliedly preempts common law claims), *cert. denied*, 469 U.S. 1062 (1984); *compare King v. Collagen Corp.*, 983 F.2d 1130 (1st Cir.) (federal medical device legislation expressly preempts common law misrepresentation and failure to warn claims), *cert. denied,* 114 S. Ct. 84 (1993), *with Michael v. Shiley, Inc.*, 46 F.3d 1316 (3d Cir.) (federal medical device legislation does not preempt common law misrepresentation and failure to warn claims), *cert. denied*, 63 U.S.L.W. 3874 (Oct. 2, 1995). It should follow no different course here.

Ford contends that review is necessary despite the recent vintage of *Cipollone* and *Myrick* because some intermediate state appeals courts and federal district courts have found implied preemption under the Safety Act since this Court decided *Cipollone*. *See* Pet. at 10-11. Disagreements at the intermediate

state appeals court and federal district court levels, however, are hardly sufficient to warrant this Court's review. Ford, therefore, maintains that the lower court decisions are not simply yielding different results, but are "eroding the very core of the federal safety policy" by discouraging "diversity in passive restraint systems." *Id.* at 12. This argument makes no sense. First, if it was current federal policy to encourage diversity in passive restraint systems, then disagreements among the lower courts would presumably reinforce that policy, not erode it. The manufacturers could hardly be prompted to take uniform actions by varying court decisions. Second, whether or not it was federal policy at some time in the past to encourage diversity in passive restraint systems, it is plainly federal policy today to encourage all auto manufacturers to install airbags in their cars. *See* 49 U.S.C. § 30127(b) (requiring airbags for front seat drivers and passengers in at least 95 percent of new cars after August 31, 1996, and 100 percent of new cars after August 31, 1997).

Ford's real reason for seeking review now is that, if the lower courts have a chance to consider the implications of *Cipollone* and *Myrick*, they are likely to agree with the Supreme Court of New Hampshire and reject the pre-*Cipollone* implied preemption federal appeals court decisions relied upon by Ford. Ford virtually concedes as much, saying, "Unless this Court resolves the conflict and confirms that the federal courts of appeals are correct and the Supreme Court of New Hampshire incorrect, more and more plaintiffs are likely to bring 'no-airbag' claims, trying to persuade still more courts to align themselves with the minority, errant no-preemption view." Pet. at 13. The likelihood that the lower courts will increasingly reject the petitioner's position is hardly a reason for granting review.[5]

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[5]Ford also argues that review is needed because, in *Myrick*, this Court mentioned but did not resolve two statutory interpretation issues raised by this case: whether section 1392(d) preempts common law claims and whether section 1397(k) preserves them. *See* Pet. at 13. That fact, however, does not support review. There is no need for this Court to resolve those issues now because there

II. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISIONS GOVERNING PREEMPTION ANALYSIS.

Ford's secondary argument is framed as one of broad application. Review is necessary, Ford insists, because "the Supreme Court of New Hampshire misconstrued and misapplied this Court's decisions that establish the manner in which preemption analysis is required to be conducted." Pet. at 14. Upon analysis, however, Ford's argument boils down to the contention that the Supreme Court of New Hampshire should have ruled in Ford's favor. Even if Ford is right, review would not be warranted on this basis. Moreover, Ford is wrong.

To begin with, Ford maintains that the Supreme Court of New Hampshire erred in rejecting Ford's argument that the Safety Act expressly preempts common law claims. Ford contends that the lower court "ignore[d] the express preemption provision" of the Safety Act and "focus[ed] solely on section 1397(k)" which, Ford says, "is not a saving clause" at all. Pet. at 15-16. In Ford's view, section 1397(k) does not address the issue of federal preemption; it simply addresses the extent to which compliance with federal regulations is an affirmative defense as a matter of state law. *Id.* at 18-20. Ford says that, in *Honda Motor Co. v. Kimbrel*, 376 S.E.2d 379, 383 (Ga. Ct. App. 1988), the court determined that compliance with federal Standard 208 was a complete defense under Georgia law to a claim that a car was defective because it lacked an airbag. *Id.* at 19. "Section 1397(k)," Ford asserts, "*permits* a state court to reach that conclusion, but it expresses Congress' intent not to *mandate* that result." Pet. at 19 (emphasis in original).

This is an astonishing argument. The Supreme Court of

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is no serious conflict about them among the state courts of last resort and the federal circuits. If and when such a conflict develops, this Court can and should act to resolve it.

New Hampshire did not ignore the Safety Act's express preemption provision. It considered the provision, as it should have, "in tandem with the saving clause." Pet. App. at 5a. When it did so, the Court correctly held, as has every state court of last resort and every federal appeals court to consider the question -- including the four federal circuits relied upon by Ford -- that section 1397(k) precludes a finding that the Safety Act expressly preempts common law claims. *See, e.g., Pokorny*, 902 F.2d at 1120-21; *Taylor*, 875 F.2d at 823-25; *Kitts*, 875 F.2d at 789; *Wood*, 865 F.2d at 401-02.

Ford's contention that section 1397(k) addresses the extent to which compliance with federal regulations is a defense as a matter of state law makes little sense. Congress was enacting a federal law, not a state law. It was concerned with the substantive content of the federal law it was enacting, not the substantive content of state laws. Furthermore, at the time Congress enacted the Safety Act (and still today), it was already the law in every state that compliance with a federal regulation is not an absolute defense in an action for negligent failure to do more. *See Restatement (Second) of Torts* 288C (1964).[6]

Under Ford's interpretation of the Safety Act, moreover, section 1397(k) would be meaningless if it only negated the state law defense of compliance with an applicable federal regulation. According to Ford, common law claims against a manufacturer for failing to do more than an applicable federal safety standard requires are preempted by the Safety Act's express preemption

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[6]*See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175 (1989) ("[f]or a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with government statutes and regulations is admissible only as evidence of the defendant's exercise of due care. Therefore, such compliance generally 'does not prevent a finding of negligence where a reasonable man would take additional precautions.'") (citing *Restatement*) (footnotes omitted).

provision. If that is so, then those common law claims simply cannot be pursued. The manufacturer would not need any defense under state law, so there would be no reason for section 1397(k) to address it. If section 1397(k) did address the content of state law, however, it would have precisely the opposite effect that Ford claims: it would not permit state courts to conclude, as Ford says Georgia's did in *Honda Motor Co. v. Kimbrel*, 376 S.E.2d at 379, that compliance with a Federal standard establishes an absolute defense against common law liability. Section 1397(k) says compliance with a Federal standard "*does not* exempt any person from any liability under common law." *Id.* (emphasis added).

Ultimately, Ford's express preemption argument fails for the same reason its implied preemption arguments fail: the plain and unequivocal words of section 1397(k) accurately reflect Congress's intent to preserve all common law claims. The Safety Act's legislative history makes this clear. As the Supreme Court of New Hampshire recognized, the original Senate version of the Safety Act contained no saving clause, but both the Senate committee report and Senator Warren Magnuson, the bill's sponsor, said that compliance with Federal standards "would not necessarily shield any person from . . . liability at common law." Pet. App. at 5a (quoting S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966) and 112 Cong. Rec. 14230 (1966)). Senator Magnuson added, "The common law on product liability still remains as it was." *Id.*

This language was not good enough for the House of Representatives, so it added section 1397(k) -- explicitly preserving all common law claims. If the plain words of that section leave any doubts as to Congress's intent, they are surely resolved by the House committee report. As the Supreme Court of New Hampshire noted, the report says:

> *It is intended*, and this subsection specifically establishes, *that compliance with safety standards is not to be a defense or otherwise to affect the*

> *rights of parties under common law* particularly those relating to *warranty*, contract, *and tort liability*.

Pet. App. at 5a-6a; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

What prompted the House of Representatives to insert section 1397(k) and make Congress's intent undeniably clear was the following Congressional testimony of Tom Triplett of Chester, South Carolina:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulations but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded.

Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives, 89th Cong., 2d Sess. Part 2, 1249 (1966). Ironically, Mr. Triplett's testimony was a prescient summary of the actions of the auto manufacturers would later take in regard to airbags. *See, e.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile*

Insurance Co., 463 U.S. 29, 50 (1980) ("the automobile industry waged the regulatory equivalent of war against the airbag"). Congress responded to that testimony by expressly preserving all common law claims.

Despite all of the foregoing, Ford contends that, even if section 1397(k) does preclude a finding of express preemption, the Supreme Court of New Hampshire erred in failing to find plaintiff's common law claims impliedly preempted. Ford advances four arguments why this is so, each of which can be dismissed in short order.

First, Ford says that the Supreme Court of New Hampshire "failed to recognize the doctrine of implied conflict preemption." Pet. at 20. This is an odd assertion, since the decision below explicitly says that, in the absence of express instruction from Congress, "state law is pre-empted to the extent that it actually conflicts with federal law." Pet. App. at 4a. The fact that the decision below did not list all of the ways that state law can be found to "actually conflict" with federal law is hardly significant. The various types of "actual conflict" were fully briefed by the parties, the pre-*Cipollone* decisions finding implied preemption on "actual conflict" grounds were considered and rejected, and the Supreme Court of New Hampshire ultimately concluded that, given the clarity of Congress's words, it could not properly find plaintiff's common law claims impliedly preempted on "actual conflict" or any other grounds. *See* Pet. App. at 6a.

Second, Ford says that the Supreme Court of New Hampshire failed to recognize that *Myrick* "rejected the notion that *Cipollone* had effectively prohibited implied preemption analysis whenever an express preemption provision exists." Pet. at 22. In fact, however, the New Hampshire Supreme Court applied *Myrick* properly. The Court acknowledged that the Safety Act contains an express preemption provision, but noted that, under *Myrick*, that fact only "supports an inference" that implied preemption is foreclosed and "does not establish a rule." Pet. App. at 4a. The

Court, therefore, reviewed both the language and the legislative history of the Safety Act to determine whether, in *Cipollone*'s words, they provided "a reliable indicium of congressional intent with respect to state authority." Pet. App. at 5a. Once it concluded that they did, the Court followed *Cipollone*'s instruction that "there is no need to infer congressional intent to pre-empt." *Id.* at 6a. Ford's true position, in contrast, is that a court may consider implied preemption even where, as here, Congress's express words *do* provide a reliable indicium of congressional intent with respect to preemption. That is not what *Myrick* says. Indeed, this Court has repeatedly reaffirmed that, in determining whether state law is preempted, its "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1987) ("*California Federal*"). If Congress's plainly expressed intent is to *preserve*, rather than preempt, common law claims, then a court lacks authority to second-guess that determination. Ford's contrary analysis turns preemption on its head, by claiming that a court can find implied preemption even when Congress has unequivocally directed "no." *Myrick* did not -- and could not -- so hold.

Third, Ford says that the Supreme Court of New Hampshire erred because it failed to recognize "that federal regulations can themselves effect implied conflict preemption." Pet. at 25. This assertion is both legally and factually misguided. As a legal matter, federal regulations *cannot* themselves effect implied conflict preemption if Congress has said they cannot. It is Congress's intent -- not the agency's or the court's -- that is the "ultimate touchstone of preemption analysis." *Cipollone*, 112 S. Ct. at 2617. In the Safety Act, Congress explicitly said that the agency's regulations do not exempt any person from liability under common law; neither the agency nor the courts are free to ignore that legal instruction. As a factual matter, even when an agency has the power to issue regulations that effect implied conflict preemption, its regulations do not preempt state laws if there is no conflict. That is the situation in this case. The version of Standard 208 in effect when Ford manufactured the 1988 Ford

Escort driven by Rebecca Anne Tebbetts did not prohibit Ford from manufacturing the car (or, for that matter, all of its cars) with a manual lap belt, a motorized shoulder harness, *and* a driver's-side airbag. It simply said that, at a minimum, Ford had to equip at least 25 percent of its 1988 model-year cars with some form of passive restraint. Even if a Federal motor vehicle safety standard could impliedly preempt a state common law claim that actually conflicts with it, Standard 208 would not impliedly preempt the common law claim in this case.[7]

Fourth, having previously insisted that section 1397(k) is not a saving clause, *see* Pet. at 16, Ford asserts that the Supreme Court of New Hampshire erred because it failed to recognize the rule that "saving clauses do not preclude implied conflict preemption" and "preclude only implied field preemption." Pet. at 25-26. To be blunt, there is no such rule, nor should there be. If Ford's rule was the law, this Court would not have repeatedly said that, in determining whether state law is preempted by federal law, the courts' "sole task is to ascertain the intent of Congress." *California Federal*, 479 U.S. at 280. Courts would be free to ignore Congress's intent, finding state law preempted whenever, in the court's view, it somehow "conflicted" with any aspect of federal law. Even if Congress had explicitly said that state law

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[7]Ford spends several pages quoting from the Secretary of Transportation's 1984 explanation as to why she was promulgating a version of Standard 208 that did not immediately require only airbags in all cars. *See* Pet. at 4-6. The Secretary's lengthy explanation was not surprising -- four years earlier, in *Motor Vehicle Manufacturers Association*, 463 U.S. at 46-48, this Court held that the agency's decision to issue Standard 208 without discussing the "airbags-only option" was "arbitrary and capricious." The explanation is, however, irrelevant to the issues in this case. Congress did not purport to give the Secretary of Transportation the power to preempt common law claims by issuing Federal safety standards, the Secretary did not purport to preempt common law claims in issuing Standard 208, and respondent does not challenge Standard 208 or the Secretary's decision to forego an "airbags-only" requirement. Respondent does not even contend that the 1988 Ford Escort driven by Rebecca Anne Tebbetts should have had an airbag only; she contends that the car should have had an airbag in addition to its lap belt and shoulder harness.

was preserved, its intent would not matter; the courts and federal agencies could displace state law on a free-roaming basis, untethered by Congress's words.

Such an outcome is, of course, the result Ford seeks in this case because, here, Congress unequivocally preserved plaintiff's common law claims. This Court has never, however, adopted Ford's unconstrained approach to implied conflict preemption. It should not review this case in order to do so now.[8]

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[8]Ford's final assertion is that the decision below is the type of "no-airbag" ruling that the United States has suggested should be reviewed by this Court. *See* Pet. at 27. That assertion is incorrect. The Brief of the United States as *Amicus Curiae* filed with this Court in *Wood* says, at 19, "[A]djudication of this case could require the Court to pass on difficult issues that have not been considered by the lower courts. One is . . . how vehicles should be treated if they were manufactured during the three year phase-in period (1987-89) when manufacturers had to install passive protection systems in only a percentage of their new cars. To our knowledge, no federal or state appellate court has considered any of these questions, and we believe it preferable that this Court not be the first to do so." As Ford accurately notes, Pet. at 27, the government then concluded, "[W]e believe that the Court should stay its hand and see whether a conflict on the preemption question hereafter develops among the federal courts of appeal or the state courts of last resort." Respondent shares that belief today.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

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December 4, 1995

No. 95-709 (3)

Supreme Court, U.S.
FILED
DEC 4 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Petitioners,

v.

JO-ANN TEBBETTS, Administratrix of the Estate
of Rebecca Anne Tebbetts,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AS *AMICI CURIAE* SUPPORTING THE PETITION

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-709

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Petitioners,

v.

JO-ANN TEBBETTS, Administratrix of the Estate
of Rebecca Anne Tebbetts,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AS *AMICI CURIAE* SUPPORTING THE PETITION

INTEREST OF THE *AMICI CURIAE*

The American Automobile Manufacturers Association (AAMA) is a non-profit national trade organization. Its member companies, Chrysler Corporation, Ford Motor Company, and General Motors Corporation, are principally engaged in the manufacture and sale of motor vehicles, including passenger cars.

The Association of International Automobile Manufacturers, Inc. (AIAM) is a trade association organized as a non-profit District of Columbia corporation representing the U.S. subsidiaries of international automobile companies.[1] AIAM's member companies

[1] AIAM members include American Honda Motor Co., American Suzuki Motor Corporation, BMW of North America, Inc., Fiat Auto U.S.A., Inc.,

manufacture and distribute passenger cars, multipurpose passenger vehicles, and light trucks in the United States.

Amici's members have a vital interest in this case and its effect on their exercise of federal safety options under Federal Motor Vehicle Safety Standard (FMVSS or Standard) 208, 49 C.F.R. § 571.208. In particular, federal preemption of "no airbag" claims under FMVSS 208 is critically important to the automobile industry. The New Hampshire Supreme Court, however, has allowed respondent to proceed with a state law tort claim that would require petitioners to install airbags in their 1988 Ford Escort, and punish them severely for not doing so. This holding, which is contrary to the holding of every federal court of appeals to consider the issue, conflicts directly and irreconcilably with the longstanding determination by the Department of Transportation (DOT or Department) in FMVSS 208 that airbags should *not* — as a matter of federal safety policy — be required in petitioners' automobile. The effect on automobile safety of the decision in this case, which turns the Supremacy Clause and firmly established principles of federal preemption law upside down, will be profound.

AAMA and AIAM seek to inform the Court of the importance of the issues raised by the petition, particularly as they affect *amici*'s members and the automobile industry in general, and the devastating consequences of leaving those issues unresolved.[2]

STATEMENT

The Supreme Court of New Hampshire held in this case that the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified without substantive change at 49 U.S.C.

Hyundai Motor America, Isuzu Motors America, Inc., Kia Motors America, Inc., Land Rover North America, Inc., Mazda Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Nissan North America, Inc., Porsche Cars North America, Inc., Rolls Royce Motor Cars, Inc., Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., Volkswagen of America, Inc., and Volvo North America Corporation.

[2] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

§§ 30101-30169) (Safety Act),[3] and FMVSS 208 do not preempt a common law tort claim that an automobile was defective because it was not equipped with an airbag. Pet. App. 5a-7a.

FMVSS 208 is "an unusual regulation," *Welsh* v. *Century Products, Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990), that has been the subject of extensive scrutiny over three decades by DOT, Congress, and the courts. The history of this Standard and the federal safety policies it embodies are at the core of the federal preemption issues presented by this case.

A. The Safety Act

Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). Public safety is the "paramount purpose" of the Act. H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966). Congress sought to protect public safety by authorizing the Secretary of Transportation under the Act to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. 15 U.S.C. §§ 1392(a), 1392(f)(3).

Congress intended the safety standards promulgated under the Act to be "uniform national standards," *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990), and achieved that objective by preempting state law in the following express terms (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

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[3] For ease of reference, we cite to the prior codification, which is cited by petitioners and was cited by the courts below.

In explaining the need to preempt state law, the Senate Report on the Act emphasized that "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 1301, 89th Cong., 2d Sess. 4 (1966). The House Report noted that "this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards." H.R. Rep. No. 1776, *supra*, at 17. As President Johnson observed: "The only alternative is unthinkable — 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14253 (1966).

The Safety Act also contains a so-called "savings" clause, which makes clear that Congress did not intend to occupy the entire field of automotive safety or create a federal affirmative defense to state tort claims. See pages 13-14, 16-18, *infra*. The clause provides that compliance with federal standards does not necessarily "exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

B. The Early History Of FMVSS 208

Pursuant to its broad statutory mandate, DOT in 1967 promulgated FMVSS 208, the occupant restraint standard, which required the installation of manual seat belts in all new cars. 32 Fed. Reg. 2415 (1967). "[T]he safety benefits of wearing seat belts are not in doubt." *MVMA* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

1. The Initial Passive Restraint Requirement (1967-1975). Because automobile users often fail to buckle their manual seat belts, DOT began to consider the feasibility of "passive" or "automatic" restraint systems — including airbags. Between 1969 and 1976, the federal government conducted over 2,000 tests of such devices to evaluate their utility. *Pacific Legal Found.* v. *DOT*, 593 F.2d 1338, 1344 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979).

During this formative period of the federal regulatory program, DOT proposed a requirement that manufacturers install a

passive restraint system selected in their discretion, but later postponed that requirement until the 1976 model year. 37 Fed. Reg. 3911 (1972). In the interim, the Department continued to grant manufacturers the option to install manual "lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected" — an option that nearly all manufacturers exercised. *State Farm*, 463 U.S. at 35-36. One year later, DOT suspended its passive restraint proposal, citing the need for further study. 38 Fed. Reg. 16073 (1973).

Responding to a wave of consumer protest, Congress intervened in 1974 to supervise the future development of FMVSS 208 and rejected DOT's "ignition interlock" requirement. 15 U.S.C. § 1410b(b)(1). Congress also declared its strong preference for traditional seat belt safety systems and provided that a non-belt safety system would be permissible only if FMVSS 208 gave manufacturers the option to install a seat belt system instead. 15 U.S.C. § 1410b(b)(2)-(3). Congress prohibited the Department from mandating airbags or any other non-belt safety systems unless it complied with special hearing procedures and awaited the results of a review by both Houses of Congress. 15 U.S.C. § 1410b(b)-(f). This provision reflected Congress' opposition to inadequately considered proposals mandating passive restraints (such as airbags) and Congress' belief that it "should not require of the automobile industry and the purchasing public anything more" than the familiar "seat belt and shoulder harness" restraint system. 120 Cong. Rec. 27815-27816, 27822-27823 (1974). Thus, "Section 1410b shows that Congress intended manual seat belts to remain one of the options for complying with federal restraint system requirements." *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116, 1123-1124 (3d Cir.), cert. denied, 498 U.S. 853 (1990).

Following this policy declaration by Congress, DOT renewed its study of passive restraints, but continued to allow compliance with FMVSS 208 by means of manual seat belts or passive restraints. 40 Fed. Reg. 16217, 16218 (1975).

2. *The Elimination of Mandatory Passive Restraints (1976-1984).* Growing concern over the effectiveness and public acceptability of passive restraint devices prompted Secretary of Transportation William Coleman to defer (41 Fed. Reg. 36494

(1976)) and ultimately to rescind (42 Fed. Reg. 5071 (1977)) a proposed passive restraint requirement. Secretary Coleman explained the policy objections to a passive restraint requirement (41 Fed. Reg. 24071 (1976)):

> These passive restraint-equipped vehicles will cost more, but, in tests to date, have been found to provide no materially greater protection to those individuals who already use lap and shoulder seat belts. Nevertheless, these individuals will have to pay more for their automobiles, without any measurable benefit * * *.

Moreover, Secretary Coleman was concerned about the "feasibility" of manufacturing millions of reliable passive restraints. *Id.* at 24072.

The Secretary also justified his decision to reject a passive restraint requirement by referring to public opinion (Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection*, at 11-12 (Dec. 6, 1976)):

> [A] substantial majority of Americans oppose the Federal government's mandating passive restraints * * *. There is widespread and serious concern among members of the public with respect to the likelihood and consequences of inadvertent air bag deployment, the possibility that airbags may cause or exacerbate injuries, and the question of whether airbags will deploy properly in situations in which they are needed.

After considering these factors, the Secretary found that a passive restraint requirement would provoke "widespread negative public reaction" and a congressional repeal of the standard after the manufacturers had retooled their production facilities. In short, a passive restraint requirement would "constitute a general setback to the auto safety movement." *Id.* at 64.

In 1977, Secretary Brock Adams reaffirmed that airbags should not be mandated. He concluded that manufacturers should be required to install some type of passive restraint in the future, but specifically rejected a rule that would order immediate installation of airbags or any other system in view of the severe technological and practical difficulties that such a requirement would cause. 42 Fed. Reg. 34295, 34296 (1977).

In response to the Secretary's proposal to require passive restraints at some point in the future, Congress intervened again in opposing mandatory passive restraints and approving manual seat belts. It provided in DOT's appropriation legislation for 1979 and 1980 that "[n]one of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system other than a belt system." 92 Stat. 450 (1978); 93 Stat. 1039 (1979). In forbidding the use of federal funds to mandate any "occupant restraint system" other than "a belt system," Congress distinguished between the familiar and publicly acceptable "active restraint system, which is the lap-shoulder belt that we have on cars today," and "a passive restraint system, which in practice means the airbag for large cars, and the automatic seat belt for small cars." 125 Cong. Rec. 36924, 36926 (1979).

Following this direction by Congress, Secretary Drew Lewis decided against mandatory passive restraints in 1981, affirming "the current option of providing either automatic or manual occupant restraints." 46 Fed. Reg. 53419, 53425 (1981). That decision was later set aside by this Court on the ground that it was not adequately explained. The Court affirmed, however, the Secretary's power to suspend any passive restraint requirement pending further agency review, *State Farm*, 463 U.S. at 57 n.21, and the Secretary promptly did so. 48 Fed. Reg. 39908 (1983).

On remand, Secretary Elizabeth Dole conducted a "thorough review of the issue of automobile occupant protection," including a study of the voluminous record on the subject. 49 Fed. Reg. 28962, 28964, 28967-28975, 28984-28996 (1984).

C. The 1984 Amendment Of FMVSS 208

As amended in 1984, FMVSS 208 called for careful implementation of passive restraint standards (either airbags or automatic seat belts) over a four-year period: 10% of cars manufactured during the 1987 model year (*i.e.*, between September 1, 1986 and August 31, 1987) were required to have passive restraints, 25% for the 1988 model year, 40% for the 1989 model year, and 100% for

the 1990 model year. 49 Fed. Reg. 28962, 28999-29000 (1984).[4] The Secretary explained that the phase-in was necessary because of "the need for the public to become accustomed to the technology and the need for protection, and [because] an across-the-board mandate too quickly could engender adverse public reaction. The Department's decision to gradually phase in the requirements of this rule will help build public acceptance of this rule." *Id.* at 28989.[5]

The Secretary's decision not to mandate airbags was premised on numerous safety concerns, including doubts about the efficacy of airbags (particularly in smaller cars in which the minimal space between the front of the car and the passenger leaves little time for the bag to inflate, *id.* at 28947, 29001) and apprehension that the high cost of airbags would lead owners not to replace them after deployment, with the result that "there would be no protection for the front seat occupants of such an automobile." *Id.* at 29001.

To allay public concerns about airbag technology, the Department explicitly encouraged manufacturers to offer a choice between automatic safety belts and airbags. The Secretary noted that "[i]t may be easier to overcome these [public] concerns if airbags are not the only way of complying with an automatic occupant protection requirement. Under the rule being issued, if people have concerns about airbags, they can purchase automobiles that use automatic belts." *Ibid.*

The Secretary's apprehension about the public acceptability of the automatic protection requirements of FMVSS 208 was not

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[4] The rule alternatively allowed manufacturers to use other technologies, such as "passive interiors," to meet the passive protection requirement (*id.* at 28995), although no such methods were known to meet the pertinent standards.

[5] The new rule provided, however, that the passive restraint mandate would be rescinded if, by 1989, states having two-thirds of the nation's population enacted laws requiring the use of ordinary three-point seat belts (so-called "mandatory use laws" or "MULs"). *Id.* at 28963-29000. Thus, DOT clearly preferred belt systems to airbags, noting that "the widespread enactment of MULs would provide increased safety benefits much more quickly and at a much lower cost, thus making recision [of the passive restraint requirement] clearly justifiable." *Id.* at 29003. The 1989 deadline ultimately was not met and the passive restraint mandate stayed in effect.

fanciful. The Secretary found that "[a]irbags engendered the largest quantity of, and most vociferously worded, comments to the docket. Some people have serious fears or concerns about airbags. If airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags. This could lead to their being disarmed, or, perhaps, to a repeat of the interlock reaction." *Id.* at 29001. The Secretary also pointed out, in this regard, that she was required by law to consider "[t]he public acceptance of safety devices likely to be installed in compliance with" FMVSS 208. See *id.* at 28987; *Pacific Legal Found.*, 593 F.2d at 1345-1346.

Finally, the Secretary decided that requiring installation of a particular passive restraint device, such as an airbag, would stifle innovation in restraint systems that might provide greater safety (49 Fed. Reg. at 29001):

> [B]y restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems. Similarly, the development of passive interiors, being pursued by GM, would be stymied under such an option.

Thus, Secretary Dole specifically found that a mandatory airbag requirement would be contrary to federal safety goals because it "runs the risk of killing the development of more effective, efficient occupant protection systems." *Ibid.* And DOT sought to encourage manufacturers to experiment with different passive restraint technologies, rather than to mandate "all airbag" fleets, in order to develop empirical data concerning the relative effectiveness of various restraint systems. *Id.* at 29000-29001.

In sum, the standard adopted by Secretary Dole in 1984 — like the standards adopted by all of her predecessors — *explicitly rejected a mandatory airbag requirement* and reaffirmed the need to encourage automobile manufacturers to develop a variety of alternative occupant restraint systems. *Id.* at 29000-29002. In light of DOT's findings about the need for a gradual public introduction to passive restraints, and the likelihood of adverse public reaction to an all-airbag mandate, the Secretary chose to implement her statutory obligation by providing *both* a phase-in schedule for the rule *and* an explicit encouragement for manufacturers to ensure the

availability of cars equipped with automatic safety belts instead of airbags. It is these federal purposes that would be frustrated by permitting juries to second-guess which passive restraints should have been installed in a particular vehicle.

Following DOT's renewed decision not to require airbags, the D.C. Circuit affirmed that rule in *State Farm Mutual Auto. Ins. Co.* v. *Dole*, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987). The court noted that the "ultimate decision not to require airbags" rested on a meticulous weighing of competing interests and a specific finding that the high costs associated with airbags threatened to reduce safety. *Id.* at 487-488 & n.27. The court held that "such details of cost-benefit analysis are 'most appropriately entrusted to the expertise of an agency'" and affirmed DOT's conclusion that public concerns about passive restraints could "best be addressed through real-world experience in the marketplace rather than by regulatory fiat." *Id.* at 488.[6]

ARGUMENT

It is undisputed that the automobile that Rebecca Anne Tebbetts was driving at the time of her accident, a 1988 Ford Escort, fully satisfied the requirements of FMVSS 208, because it was equipped with a safety restraint system consisting of a motorized, automatic shoulder belt and a manual lap belt. Pet. 4. In particular, the automobile was not required by FMVSS 208 to have an airbag; the Standard then in effect granted manufacturers an option — for safety reasons — to install either an airbag or some other type of passive restraint system. Indeed, in 1987 Secretary Dole reaffirmed the need for flexibility and choice in passive restraint systems, 52 Fed. Reg. 10096 (1987), and noted that federal safety policy purposely did not "require manufacturers to

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[6] In 1991, Congress amended the Safety Act to require the Department of Transportation to modify FMVSS 208 to mandate airbags in 95% of 1997 model passenger cars and 100% of the 1998 models. Pub. L. No. 102-240, § 2508. In passing this legislation, Congress noted that it did not seek to change the preemptive effect of FMVSS 208 for vehicles manufactured without airbags *before* they were required by federal law. Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 (1991); see page 14, *infra*.

install airbags or any other particular type of automatic restraint system." *Id.* at 42441.

Respondent nonetheless seeks to punish petitioners with massive tort liability for failing to install an airbag in the 1988 Ford Escort. This claim, however, is preempted by the Safety Act and FMVSS 208. The Supremacy Clause of the Constitution requires that any conflict between federal law (whether a statute or a regulation) and state law must be resolved in favor of federal law. U.S. Const. art. VI, cl. 2; *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982); *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). Federal preemption occurs in three contexts. First, Congress may expressly declare that state law is preempted. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). Second, Congress may implicitly override state law where the breadth of a federal statute indicates a congressional intent to occupy the field exclusively. See *English* v. *General Electric Co.*, 496 U.S. 72, 78-79 (1990). Third, state law may conflict with federal law either by making it impossible "to comply with both state and federal requirements," *id.* at 79, or by standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Application of these principles to this case leads to the inescapable conclusion that respondent's tort claim based on petitioners' decision not to install an airbag is both expressly and impliedly preempted by the Safety Act. Federal law granted petitioners the express option — as a matter of safety policy developed over decades of laborious study by an expert federal agency — to equip the 1988 Ford Escort with a motorized, automatic shoulder belt and a manual lap belt rather than an airbag. And the Safety Act, in Section 1392(d), expressly preempts any inconsistent state law requirements.

Nevertheless, the Supreme Court of New Hampshire joined a minority of the lower courts in holding that FMVSS 208 does not preempt an inconsistent state common law rule that would *mandate* airbags. Pet. App. 5a-7a. The decision below, which conflicts with the decisions of every federal court of appeals to consider this

important issue, cannot stand in light of the Supremacy Clause and this Court's precedents. Review by this Court is essential.

I. THE SUPREME COURT OF NEW HAMPSHIRE'S DECISION CONFLICTS WITH THE DECISIONS OF SEVERAL FEDERAL COURTS OF APPEALS, INCLUDING THE FIRST CIRCUIT, ON WHETHER FMVSS 208 IMPLIEDLY PREEMPTS "NO AIRBAG" CLAIMS

1. The New Hampshire Supreme Court's decision in this case squarely conflicts with decisions by the First, Third, Tenth, and Eleventh Circuits finding implied conflict preemption of common law tort claims by the Safety Act and FMVSS 208. See *Wood* v. *General Motors Corp.*, *supra*; *Pokorny* v. *Ford Motor Co.*, *supra*; *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990). Indeed, as petitioners explain (see Pet. 9-13; Pet. App. 37a-50a), the decision below joins more than 150 other lower court decisions that have addressed the preemption question over the last ten years. The split among these decisions is broad, growing, and irreconcilable. Only this Court can definitively resolve the important issue of federal law presented by this case.

It is especially imperative that the Court resolve the conflict exacerbated by the decision below because the New Hampshire Supreme Court's ruling is directly at odds with a decision of the First Circuit. The First Circuit held in *Wood* that "no airbag" tort claims such as respondent's are impliedly preempted by the Safety Act and FMVSS 208. Thus, if petitioners had been sued in federal court in New Hampshire, respondent's claim would have been dismissed; because petitioners instead were sued in New Hampshire state court, they are now faced with potentially massive damages liability. It is wholly intolerable for the meaning of a federal statute to depend upon whether the plaintiff chooses to file suit in state or federal court. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985) (resolving "significant conflict" between the Eleventh Circuit and the Supreme Court of Alabama).

2a. Review of the New Hampshire Supreme Court's implied preemption ruling is also warranted because the court below justified its failure to follow the "majority of courts faced with a

similar preemption inquiry" (Pet. App. 6a) on the basis of a misinterpretation of this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). Specifically, the court below held that the Safety Act's preemption clause, interpreted "in tandem" with the Act's "savings" clause, "provides a 'reliable indicium of congressional intent with respect to state authority'" (*id.* at 517) and thus demonstrates Congress' intent not to allow implied conflict preemption under the Safety Act. Pet. App. 5a-6a. In the New Hampshire Supreme Court's view, "[h]ad the United States Supreme Court not clarified preemption analysis in *Cipollone* subsequent to *Wood*, Ford's [implied preemption] argument would be more persuasive." *Id.* at 6a.

The New Hampshire Supreme Court's interpretation of *Cipollone* is plainly wrong. Just last Term, this Court stated in *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483, 1488 (1995), that the existence of an express preemption clause in a statute does not "foreclose[] any possibility of implied pre-emption" and that *Cipollone* does not "obviate the need for analysis of an individual statute's pre-emptive effects." Moreover, the Court went on to hold that the express preemption provisions of the Safety Act *do not* eliminate the need to engage in an implied preemption analysis; the Court rejected the implied preemption defense in *Myrick* because it found that the plaintiffs' "common-law actions do not conflict with federal law" and do not "frustrate 'the accomplishment and execution of the full purposes and objectives of Congress'" (*id.* at 1488, quoting *Hines*, 312 U.S. at 67)), *not* because it was inappropriate to consider implied preemption under the Act.

There are several reasons why the Safety Act's preemption clause does not provide a reliable indication of congressional intent to preclude implied preemption of state laws that conflict with the federal scheme embodied in the Act. To begin with, Section 1397(k), the so-called "savings" clause, indicates Congress' intent *not* to occupy the entire field of motor vehicle safety, so that common law claims could proceed in areas *not* covered by a federal safety standard. Faced with savings clause language in other statutes, this Court has interpreted them in this fashion. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981); *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 130 (1915). Yet there would have been no need for

Congress to have been concerned with implied "field" preemption if the mere existence of the express preemption provision precluded any implied preemption defense.

Furthermore, a recent amendment to the Safety Act, not discussed by the New Hampshire Supreme Court, provides additional evidence that the court's conclusion on congressional intent is wrong. In reauthorizing the Safety Act in 1991, Congress explicitly ratified implied preemption in directing DOT to amend FMVSS 208 to require airbags in all new motor vehicles. See note 6, *supra*. Congress recognized that several federal courts of appeals had held that tort suits based on the failure to install airbags were impliedly preempted and that an "all airbag" amendment might be construed as disturbing those precedents. See Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 (1991); H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. The 1991 amendment therefore specified that it

> shall [not] be construed by any * * * court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Section 2508(d), 105 Stat. 2086. The conference report, citing the prior decisions on implied preemption, explained that Congress "do[es] not want by this section to change the law on liability as it existed prior to enactment" (*i.e.*, late November 1991). H.R. Conf. Rep. No. 404 at 403, *reprinted in* 1991 U.S.C.C.A.N. at 1783. This legislation and its history show conclusively that — contrary to the New Hampshire Supreme Court's holding — the Safety Act's express preemption provision does not reliably indicate Congress' intent to preclude implied preemption analysis.[7]

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[7] The New Hampshire Supreme Court also erred in relying on a "presumption against preemption" in finding no implied conflict preemption under the Safety Act. Pet. App. 6a. This Court has held that there is no presumption against preemption in deciding whether state law conflicts with federal law. See *Felder* v. *Casey*, 487 U.S. 131, 138 (1988). Indeed, absent compelling evidence to the contrary, it should be presumed that Congress did not intend to eliminate the

b. If the New Hampshire Supreme Court had not misconstrued *Cipollone*, it would have been compelled to agree with the First Circuit in *Wood* that respondent's tort claim was impliedly preempted by the Safety Act. As described in detail above (see pages 3-10, *supra*), the central feature of the federal safety program codified in FMVSS 208 was a carefully calibrated plan to encourage the automobile industry to offer a variety of passive restraint technologies in the market. The goal of Congress and DOT, over more than two decades, was to provide design flexibility to foster technological innovation and field experience that would make passive restraint systems safer and more acceptable to the general public. Moreover, DOT sought to encourage manufacturers to experiment with different passive restraint technologies, rather than to mandate "all airbag" fleets, in order to develop empirical data concerning the relative effectiveness of various restraint systems. The element of "choice" in the federal program was, therefore, not an expression of neutral indifference to airbags by DOT, but a purposeful element of a program designed to address the serious, substantive doubts about the utility, public acceptability, and feasibility of requiring the industry to adopt airbags prematurely.

By contrast, the state law tort standard advocated by respondent would punish automobile manufacturers for not taking the very step that the federal program rejected as contrary to federal safety policy: installing airbags in every car built in 1988. The effect of upholding such liability would be directly to nullify the policy balances that are at the heart of FMVSS 208. It is difficult to imagine a clearer example of state law acting as an "obstacle" to the "accomplishment and execution" of a federal administrative program — a program with "an intricate and contentious history of over 20 years" that has involved intensive administrative and congressional attention and effort. *Wood*, 865 F.2d at 398. Respondent's common law tort claim is impliedly preempted because it would strip away an option (and attendant restraint design flexibility) that Congress and DOT believed to be essential to achieve federal policy goals. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 708-709 (1984) (state law cannot deprive

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implied preemption doctrine. After all, why would Congress want to authorize state action that conflicts with or frustrates the purposes of federal law?

regulated entities of "flexibility and discretion" deliberately conferred by federal law); *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 260-261, 270 (1985) (state law is preempted to the extent it eliminates "flexibility" contemplated by federal law); *de la Cuesta*, 458 U.S. at 155 (same).

II. THE SUPREME COURT OF NEW HAMPSHIRE ERRED IN FINDING NO EXPRESS PREEMPTION

The New Hampshire Supreme Court also erred in holding that respondent's tort claim was not expressly preempted. Despite the clear preemptive language of Section 1392(d), the court based its holding on Section 1397(k) of the Act, the so-called "savings" clause. Pet. App. 4a-5a. Indeed, the court acknowledged that, in the absence of Section 1397(k), "the language of the preemption clause alone might suggest that common law actions are preempted." *Id.* at 4a.

Section 1397(k) provides that compliance with a FMVSS "does not exempt any person from any liability under common law." This section, however, was intended to serve two functions that are far narrower than the broad "saving" function ascribed to it by the New Hampshire Supreme Court. The court below failed to address either of these functions — or the many decisions of this Court supporting this narrower interpretation. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) ("general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision").

1. As petitioners note (Pet. 14-20), the plain language of Section 1397(k) indicates that it was designed to preclude courts from recognizing a federal affirmative defense of compliance with government statutes or regulations. This reading of the clause is confirmed by comparing Section 1397(k) with other portions of the Safety Act that were in fact intended to preserve common law rights and remedies. For example, Section 1392(d) contains two specific exceptions to the preemption mandate, using unmistakable "saving" language. See Pet. 16-17. In addition, Section 1420 of the Act provides that

> [t]he provisions of this part [pertaining to safety recalls] shall not create or affect any warranty obligation under State or

> Federal law. Consumer remedies under this part are in addition to, and not in lieu of, any other right or remedy under State or Federal law.

Plainly, Congress knew how to enact true "savings" clauses preserving state rights and remedies from federal preemption, and explicitly did so in several instances. By contrast, Section 1397(k) does *not* purport to preserve state law rights or remedies that would otherwise be preempted; it merely indicates that the Act does not create a federal affirmative defense based on "compliance with" a federal safety standard.

2. Section 1397(k) also preserves common law actions that do not conflict with, or frustrate the purpose of, applicable federal safety standards — even if they may be said to relate to the "same aspect of performance." This case is an excellent example: FMVSS 208 expressly granted for safety reasons (see pages 3-10, *supra*), a choice whether to install airbags. Section 1397(k) would thus preserve a common law claim that an airbag was negligently manufactured. On the other hand, it would not preserve a common law action, such as the claim under review here, seeking to recover damages merely for exercising a federally granted safety option to install seat belts rather than an airbag. Such a lawsuit is inconsistent with FMVSS 208 because it extinguishes a choice granted, as a matter of safety, by DOT. See *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install claim from a claim that a chosen system was not properly designed, and holding that the latter is not preempted).

This Court has often warned that general savings clauses should not be construed in an indiscriminate fashion to allow common law claims that would subvert a federal regulatory scheme. In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a general savings clause could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the statute to "destroy itself." *Ibid.*; see *Morales*, 504 U.S. at 385; *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-495 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Pennsylvania R.R.*, 237 U.S. at 129.

Congress was surely aware of this Court's longstanding view that a general savings clause does not preclude conflict preemption, and it could not have intended a contrary result under the Safety Act without explicitly so providing. Yet Congress did not include even a general savings clause in the Act, opting instead for a provision that precludes merely an affirmative defense of compliance with federal standards. See *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430, 432 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995) (interpreting narrowly similar "savings" clause language).[8]

The New Hampshire Supreme Court ignored this Court's precedents and the narrow focus of Section 1397(k) in construing it to "save" a state law claim that would render Section 1392(d) largely meaningless.

III. IMMEDIATE REVIEW IS NECESSARY TO ADDRESS A QUESTION OF NATIONAL IMPORTANCE

Prompt review of the New Hampshire Supreme Court's ruling is essential. The decision below reflects substantial confusion concerning the legal principles governing, and a sharp conflict in the lower courts on, an issue of exceptional significance affecting national automobile safety and the automobile industry.

1. The decision in this case dramatically undermines an important federal safety regulation that was explicitly sanctioned by Congress and that was supported by decades of extensive study by an expert federal agency. Not surprisingly, the United States has repeatedly taken the position before this Court and other courts that a state tort law claim (such as respondent's) that would punish a manufacturer for not installing an airbag would conflict with

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[8] The *Carstensen* court interpreted the "savings" clause of the Federal Boat Safety Act, 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law"), which is virtually identical to Section 1397(k), and held that the Act's "general savings clause should not be interpreted to subvert th[e] goal [of establishing uniform boating safety requirements]." 49 F.3d at 432. The court observed that the "stated purpose of the savings clause is 'to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.' S.Rep. No. 248, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 1333, 1352." 49 F.3d at 432.

Standard 208 and is preempted. See, *e.g.*, Brief for the United States as *Amicus Curiae*, *Wood* v. *General Motors Corp.*, 494 U.S. 1065 (1990), at 13 (policy underlying Standard 208 is "likely to be frustrated if manufacturers are held liable for not installing airbags in their vehicles"); Brief for the United States as *Amicus Curiae*, *Ritt* v. *General Motors Corp.*, No. 88-1822 (7th Cir. 1989), at 24 (there would be an "actual conflict" between a "state tort ruling imposing liability on the basis of a failure to install airbags" and Standard 208).

Just last Term, the United States informed this Court that

> [i]n promulgating * * * Standard [208], the Secretary concluded that, because of a history of substantial consumer resistance to automatic, or passive, occupant restraint systems, passenger safety would be best served by a diversity of such restraint systems, including but not limited to airbags, which would promote public acceptance of passive restraints. The Secretary explicitly determined that an all-airbag rule would have disserved the safety purposes of the Act.

Brief for the United States as *Amicus Curiae*, *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995), at 28. As a result, the federal government concluded that "[i]nterference with that federally protected freedom of choice through state tort judgments would * * * conflict[] with Standard 208." *Ibid.*

Thus, the decision by the New Hampshire Supreme Court in this case, allowing a state law "no airbag" claim to proceed, undermines FMVSS 208 and the important federal safety policies that the regulation embodies.

2. For the member companies of *amici*, and the automobile industry in general, the decision in this case raises concerns both of fundamental fairness and enormous potential liability. There are literally millions of automobiles on the road today that are not equipped with airbags, or other specific passive restraints, because manufacturers duly followed longstanding federal policy not to require installation of one type of restraint system. If common law claims such as respondent's were allowed to proceed, automobile manufacturers would be punished — in an unforeseeable, retroactive manner and with unprecedented severity — for adhering to

federal safety policy and conforming to what was supposed to be a "national" safety standard (*Wood*, 865 F.2d at 412). Instead of a national rule, juries in some states would punish manufacturers for not having four-point seat belts, others could require three-point seat belts, yet others frontal airbags (driver's or passenger's side, front or rear), and still others motorized seat belts — or some combination of these and a host of other restraint devices.

Litigation over the preemptive effects of FMVSS 208 has proceeded for a decade, with no end in sight. The lower courts are hopelessly divided, and the decision below — the first by a state supreme court to disagree with the federal courts of appeals — is certain to encourage further tort suits. Only this Court can put an end to this controversy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1995

No. 95-709

Supreme Court, U.S.
FILED
DEC 14 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Petitioners,

v.

JO-ANN TEBBETTS, Administratrix of the Estate of
Rebecca Anne Tebbetts,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

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REPLY BRIEF FOR THE PETITIONERS

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Arbet v. Gussarson, 225 N.W.2d 431 (Wis. 1976).. 3
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Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990).. 2, 3, 8

STATUTES AND REGULATIONS

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OTHER AUTHORITIES

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REPLY BRIEF FOR THE PETITIONERS

Our petition showed that "no-airbag" tort claims conflict with, and are therefore preempted by, the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208; that all four United States Courts of Appeals which have addressed the issue have so held; that more than 130 other courts have so held; and that the decision below by the Supreme Court of New Hampshire directly conflicts with all of those decisions. Respondent Tebbetts nevertheless contends that there is no conflict. She also contends that the judicial disarray on this issue, which already has had to be decided by nearly 200 courts, has sharply divided state and federal courts in several jurisdictions, and continues to be litigated throughout the country, is not important enough to require review by this Court. Those conclusions are as indefensible as are the arguments on which Tebbetts bases them.

1. Tebbetts makes the remarkable assertion that the decisions by four federal courts of appeals holding "no-airbag" claims preempted "are of no moment" because they were based on implied-preemption reasoning in tobacco product liability cases that was "explicitly reject[ed]" by this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). (Opp. Br. 7.) But in holding "no-airbag" claims impliedly preempted, the federal courts of appeals in fact cited tobacco cases solely for the established principle that a "state tort suit [could be] preempted [if] it had a regulatory effect." *Wood v. General Motors Corp.*, 865 F.2d 395, 417 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 n.16 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). *See also Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1122 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990). This Court explicitly *affirmed* that preemption principle in holding various state tort claims preempted in *Cipollone*.[1] *Cipollone*, 504 U.S. at 521-22.

Nevertheless, Tebbetts claims that the decisions in pre-*Cipollone* tobacco cases must have "infected the interpretation of the Safety Act" (Opp. Br. 7) because in the years before the tobacco decisions, "eight federal appeals courts and five state courts of last resort" had held that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law." (*Id.* at 6.) But the inconsistency

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[1] In *Pokorny* the Third Circuit also cited its previous tobacco decision for the proposition that an express preemption provision does not expressly preempt common law claims unless the provision explicitly refers to such claims. *Pokorny*, 902 F.2d at 1123. Other courts that have held "no-airbag" claims not expressly preempted have made that same mistake. *See, e.g., Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 320 (Pa. Super. Ct. 1989). In *Cipollone* this Court explicitly rejected that notion. *Cipollone*, 505 U.S. at 521-23. Therefore, not only did *Cipollone* not undermine the decisions holding "no-airbag" claims impliedly preempted, but it in fact gave further support to the decisions holding such claims expressly preempted.

that Tebbett claims to see between the early cases she cites and the more than 130 subsequent cases holding "no-airbag" claims preempted is chimerical. The cases she cites held that compliance did not constitute a defense, but they did not, as she clearly wishes this Court to infer from her statement, hold that common law claims are not preempted when they conflict with an applicable Federal Motor Vehicle Safety Standard. To the contrary, *none* of those cases involved Safety Standard 208, *none* involved a "no-airbag" claim, and *none* addressed the issue of implied conflict preemption or express preemption. Only one of the cases mentioned preemption at all, and that case addressed only the issue of implied preemption of the field. *See Arbet v. Gussarson,* 225 N.W.2d 431, 438 (Wis. 1976). Thus, as the First Circuit stated of those cases when holding "no-airbag" claims preempted in *Wood,* 865 F.2d at 417:

> The cases cited by Wood [and cited by Tebbetts here] fail to support this assertion. Not a single appellate decision addresses the question of the implied preemption of a state law cause of action that would effectively create a state standard, not identical to a federal standard, in violation of [the Safety Act's preemption provision, 15 U.S.C.] section 1392(d).
>
> Instead, the cited cases hold that compliance with a federal safety standard does not serve as a defense on the merits of a defective design claim. . . .
>
> The issue in this case—implied preemption of a state product liability suit that would stand as an obstacle to the uniformity of federal standards—is distinct from a defense on the merits. . . . The latter is much broader—the manufacturer just claims compliance with a standard, and argues that compliance proves that the car could not have been defectively designed.

The fact that *Cipollone* did nothing to undermine the many cases holding "no-airbag" claims preempted is further shown by the very post-*Cipollone* cases on which Tebbetts relies: *Myrick v. Freuhauf Corp.,* 13 F.3d 1516

(11th Cir. 1994), *aff'd on other grounds sub nom. Freightliner Corp. v. Myrick*, —— U.S. ——, 115 S. Ct. 1483 (1995); and *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Ariz. 1994), *vacated and remanded*, —— U.S. ——, 115 S. Ct. 1819 (1995). In those cases the Eleventh Circuit and the Arizona Supreme Court both misread this Court's decision in *Cipollone* as having dramatically changed preemption law so as to preclude any form of implied preemption when the federal statute in issue contained an express preemption provision. *See Myrick*, 13 F.3d at 1521; *Hernandez-Gomez*, 884 P.2d at 189. On review in *Myrick*, however, this Court flatly rejected that misreading of *Cipollone* as "without merit," 115 S. Ct. at 1487, and the Court then vacated the Arizona Supreme Court's judgment in *Hernandez-Gomez* (which is not a "no-airbag" case in any event) and remanded for reconsideration in light of *Myrick*. Thus, the decision in *Myrick* made it plain that *Cipollone* did not alter the basic implied preemption analysis that led more than 130 state and federal courts to conclude that "no-airbag" claims were preempted.

2. Tebbetts is also wrong in contending that the dozens of post-*Cipollone* cases holding "no-airbag" claims preempted should be ignored simply because they are decisions by federal district courts and state courts that are not courts of last resort. As shown in our petition, and as Tebbetts does not deny, this important constitutional issue has already been decided by nearly 200 courts and yet continues to occupy the time and resources of courts throughout the country. As further shown in our petition, and as also not denied by Tebbetts, *every* federal court that has considered this issue since this Court decided *Myrick* has held "no-airbag" claims preempted,[2] while

[2] Since we filed our petition, two more federal district courts have held "no-airbag" claims preempted. *See Hill v. General Motors Corp.*, No. 94-AR-0088-S (N.D. Ala. Nov. 15, 1995); *Beeman v. Lovelace*, No. CIV-94-1956-A (W.D. Okla. Nov. 2, 1995).

several state courts have continued to misread *Cipollone* and have found no preemption. It is simply intolerable that the viability of a "no-airbag" claim in a growing number of jurisdictions should turn on whether the plaintiff chooses a federal courthouse or the state courthouse across the street. It is equally intolerable that the state courts that have found an absence of preemption are doing so in direct disregard of the repeatedly articulated federal policy of encouraging a diversity of restraint systems in automobiles made before the 1997 model year.

Tebbetts tries to dismiss these severe problems by arguing that, "if it was [*sic*] current federal policy to encourage diversity in passive restraint systems, then disagreements among the lower courts would presumably reinforce that policy, not erode it. The manufacturers could hardly be prompted to take uniform actions by varying court decisions." (Opp. Br. 11.) That argument is pure sophistry. Faced with many courts' holding that *either* airbags *or* other restraint systems are sufficient to prevent massive tort liability, but with some other courts' holding that airbags must be installed to avoid the threat of massive "no-airbag" tort liability, automobile manufacturers making the same vehicles for all states in 1988 would have been forced into uniform action—namely, installation of airbags in all vehicles—because only that course of action could have prevented liability in all jurisdictions. This is especially obvious where, as in New Hampshire, the conflicting court decisions are in the very same locale and manufacturers cannot predict which of their automobiles will be in accidents that result in lawsuits in state courts and which will be in accidents that result in lawsuits in federal courts.

Tebbetts is equally wrong in arguing that, "whether or not it was federal policy at some time in the past to encourage diversity in passive restraint systems, it is plainly federal policy today to encourage all auto manufacturers to install airbags in their cars. *See* 49 U.S.C.

section 30127(b) (requiring airbags for front seat drivers and passengers in at least 95 percent of new cars after August 31, 1996, and 100 percent of new cars after August 31, 1997)." (Opp. Br. 11.) What the cited statute shows is a federal policy to require automobile manufacturers to install airbags *after August 31, 1996*. If federal policy had been to encourage manufacturers to install airbags today, the statute would have made the requirement applicable today. The timing selected by Congress reflects appropriate congressional concern that disastrous consequences could result from a premature airbag requirement. In fact, data just published by the Safety Administration show that more than 50,000 airbag-related injuries and deaths are already occurring every year. *See NHTSA Publication Provides In-Depth Crash Data,* 22 Highway & Vehicle/Safety Rep. No. 6, at 4 (Nov. 27, 1995). That tragedy could well have been greater had Congress or the Safety Administration prematurely rushed an all-airbag requirement into effect.

3. Tebbetts next argues that this Court's decision in *Myrick* supports the decision below because in *Myrick* "[t]his Court did not address the Eleventh Circuit's holding that, under *Cipollone,* section 1397(k) constitutes such a 'reliable indicium of congressional intent' that it precludes a finding of implied preemption under the Safety Act." (Opp. Br. 9.) As shown in our petition, however, and as Tebbetts does not deny, this Court in *Myrick had* to have implicitly rejected the Eleventh Circuit's "reliable indicium" conclusion because, after having found an absence of express preemption, this Court did not conclude that it was inappropriate to consider implied preemption under the Safety Act; instead, this Court performed an implied-preemption analysis and held that, because of the absence of a conflict between state law and federal law under the facts of that case, there was no implied preemption. *See Myrick,* 115 S. Ct. at 1488.

4. Tebbetts argues that the decision below "is entirely consistent with this Court's decisions governing preemption analysis" (Opp. Br. 12), but the contentions she makes to support that argument are specious.

a. She contends that by enacting section 1397(k), "Congress enacted an express anti-preemption clause that explicitly preserves common law claims." (Opp. Br. 9.) But section 1397(k) is not an "express anti-preemption clause." As shown in our petition, and as Tebbetts does not deny, (a) section 1397(k) never even mentions anti-preemption, preemption, or federal supremacy at all; (b) section 1397(k) does not appear in the Safety Act's actual preemption provision; (c) section 1397(k) does not use saving-clause language of the type commonly used by Congress to limit the scope of preemption provisions; (d) there are two true saving clauses in the preemption provision of the Safety Act itself; (e) the legislative history of section 1397(k) makes no mention of anti-preemption, preemption, or federal supremacy; and (f) the failure of the Supreme Court of New Hampshire to consider, much less give effect to, these undisputed textual and structural facts is inconsistent with this Court's decisions requiring consideration of a preemption provision's text and structure. *See, e.g., CSX Transp., Inc. v. Easterwood*, —— U.S. ——, ——, 113 S. Ct. 1732, 1737 (1993); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

b. Tebbetts concedes that the court below failed even to mention, much less apply, the doctrine of implied preemption that governs when a state law stands as an obstacle to the accomplishment of the full purposes and objectives of a federal law (Opp. Br. 16), yet she asks this Court to disregard that constitutional error as "hardly significant" on the grounds that "various types of 'actual conflict' were fully briefed by the parties" and "the pre-*Cipollone* decisions finding implied preemption on 'actual conflict' grounds were considered and rejected" by the court below. (Opp. Br. 16.) Tebbetts cites no authority,

and we know of none, for the proposition that an error which results from a court's failure to apply, or even recognize, a constitutional requirement can be disregarded simply because the parties briefed the requirement that the court ignored or because the court "considered and rejected" other courts' decisions without recognizing the constitutional principles on which those decisions were correctly based.

c. Tebbetts contends that the court below correctly rejected "Ford's true position . . . that a court may consider implied preemption even where, as here, Congress's express words *do* provide a reliable indicium of congressional intent with respect to preemption." (Opp. Br. 17 (emphasis in original).) But that completely mischaracterizes Ford's position, which is that section 1397(k) does not address preemption at all, much less provide a reliable indicium of congressional intent. (*See* Pet. 14-20.) It also ignores the fact that the First Circuit and other courts have explicitly held that section 1397(k) does *not* provide a reliable indicium of congressional intent to preclude conflict preemption of common law claims. *See, e.g., Wood*, 865 F.2d at 401-02, 407, 414-16. Even the court below recognized that the preemption provision, section 1392(d), indicates Congress' intent to preempt common law claims. (*See* Pet. App. 4a.) It was only by looking outside the preemption provision, to section 1397(k), and then ignoring the "compliance with" language of section 1397(k) that the court could offer any basis for restricting the scope of section 1392(d). Thus, the court ignored this Court's mandate to ask whether *the preemption provision* provided a reliable indicium of congressional intent, and instead asked whether a *different* provision provided a reliable indicium of congressional intent.

d. Tebbetts contends that there is no conflict between Safety Standard 208 and her "no-airbag" claim and that the court below therefore properly ignored this Court's

decisions giving preemptive effect to federal regulations. (Opp. Br. 17.) But the Safety Administration has repeatedly declared that there *is* a direct conflict and that "no-airbag" claims *do* undermine federal motor vehicle safety policies. (*See* Pet. 21-22.) Tebbetts does not even mention, much less explain, why it was proper for the court below to disregard those declarations of regulatory intent.

e. Finally, Tebbetts denies that general saving clauses do not preclude implied conflict preemption. (Opp. Br. 18.) Like the court below, however, she does not even mention, much less discredit or distinguish, the unbroken line of decisions by this Court cited in our petition and holding that general saving clauses could not preclude implied preemption where the asserted common law claim conflicted with the policies and purposes of federal law. (*See* Pet. 26 (citing *John Hancock Mut. Life Ins. Co. v. Harris Trust Sav. Bank*, —— U.S. ——, ——, 114 S. Ct. 517, 526 (1993); *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 331 (1981); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).)

In sum, Tebbetts' contention that the decision below "is entirely consistent with this Court's decisions governing preemption analysis" rests on her ignoring altogether this Court's saving-clause decisions, the Safety Administration's repeated affirmations that "no-airbag" claims are preempted, the "compliance with" language of section 1397(k), this Court's decisions construing "standard" and "safety standard" to include common law standards, this Court's decisions holding that implied preemption exists when a common law claim stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, and this Court's decisions requiring that pre-

emption provisions be interpreted in light of their texts and structures. A decision that conflicts with such a plethora of preemption principles established by this Court, and with more than 130 decisions by other courts addressing the same issue, should be reviewed and reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1995